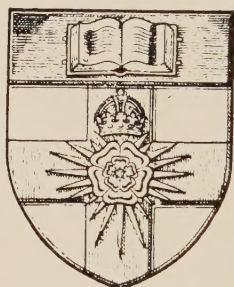


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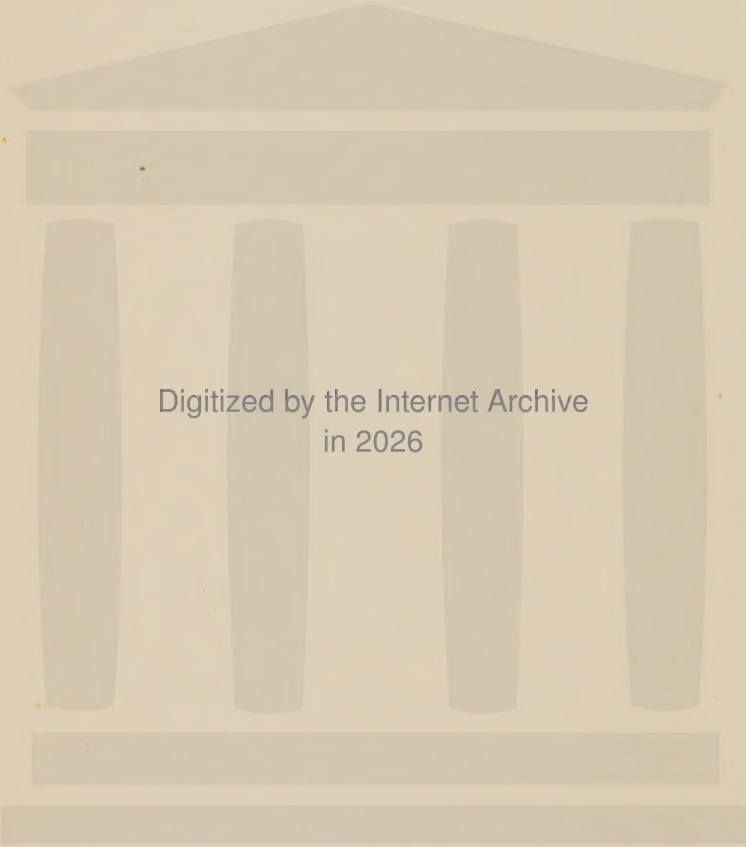
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Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), *General Rules*, r. 23, sub-r. 2. *WHITESIDE v. WHITESIDE*

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1922

Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), sch. XV, para. 5. *In re* GREENWOOD'S AGREEMENT. *PARKUS v. GREENWOOD*

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644

1923

Mines (Working Facilities and Support) Act, 1923 (13 & 14 Geo. 5, c. 30), s. 9, sub-s. 2. *In re* NAYLOR BENZON MINING CO., LD. **Wynn-Parry J. 567**

1925

Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 13, s. 18, sub-s. 1 (a) (b), s. 71, sub-s. 1, s. 98, sub-s. 3, s. 110, sub-s. 1, s. 112, sub-s. 2, s. 117, sub-s. 1 (v) **WESTON v. HENSHAW**

Danckwerts J. 510

Trustee Act, 1925 (15 Geo. 5, c. 19), s. 57. MUNICIPAL AND GENERAL SECURITIES CO. LD. *v.* LLOYDS BANK

Wynn-Parry J. 212

Law of Property Act, 1925 (15 Geo. 5, c. 20) s. 62, sub-s. 2. **GOLDBERG v. EDWARDS** - - **C. A. 247**

Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 33, sub-ss. 1, 2, s. 34, sub-s. 3, sch. I, pt. II. *In re* BEAUMONT'S WILL TRUSTS

Danckwerts J. 462

— s. 34, sch. I, Part II, para. 1. *In re* GILLETT'S WILL TRUSTS. **BARCLAYS BANK LD. v. GILLETT**

Roxburgh J. 102

— s. 34, sub-s. 3, sch. I, Part II, para. 2. *In re* RIDLEY, DECD. **NICHOLSON v. NICHOLSON**

Harman J. 415

— s. 51, sub-s. 2. *In re* BRADSHAW. **BRADSHAW v. BRADSHAW**

Danckwerts J. 78, 582

— s. 55, sub-s. 1 (x). *In re* CHAPLIN, DECD. - - **Vaisey J. 507**

— s. 64, sub-s. 1. *In re* MOUNT EDGCUMBE (EARL) **Harman J. 615**

Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), s. 1. *In re* COLLINS (AN INFANT) - - **C. A. 498**

— s. 7, sub-s. 3. *In re* STERN. **STERN v. STERN** - **Romer J. 550**

1930

Land Drainage Act, 1930 (20 & 21 Geo. 5, c. 44), s. 9, sub-ss. 1, 3, 5. **ETON R.D.C. v. THAMES CONSERVATORS**

Vaisey J. 540

1932

Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), s. 69. **LOESCHER v. DEAN**

Harman J. 491

1936

Housing Act 1936 (26 Geo. 5 & 1 Edw. 8 c. 51), ss. 83, 85, sub-s. 5. **BELCHER AND OTHERS v. READING CORPORATION** - - **Romer J. 380**

1938

Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. 6, c. 45), ss. 1, 3. *In re* SIMSON, DECD. **SIMSON v. NATIONAL PROVINCIAL BANK LD.**

Vaisey J. 38

Coal Act, 1938 (1 & 2 Geo. 6, c. 52). *In re* GALWAY'S WILL TRUSTS. **LOWTHER v. GALWAY (VISCOUNT)**

Harman J. 1

1939

Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 2. **WESTMINSTER CORPORATION v. HASTE** - **Danckwerts J. 442**

Trading with the Enemy Act, 1939 (2 & 3 Geo. 6, c. 89) s. 7. **REPUBLIC OF ITALY v. HAMBROS BANK LD. AND GREGORY (CUSTODIAN OF ENEMY PROPERTY)** - **Vaisey J. 314**

1940

Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 44, sub-s. 1. *In re* EARL FITZWILLIAM'S AGREEMENT - **Danckwerts J. 448**

Finance (No. 2) Act, 1940 (3 & 4 Geo. 6, c. 48), s. 31, sub-s. 2. *In re* A DEBTOR (No. 564 OF 1949). *Ex parte* COMMRS. OF CUSTOMS AND EXCISE *v.* THE DEBTOR **C. A. 282**

1941

War Damage Act, 1941 (4 & 5 Geo. 6, c. 12), s. 46, sub-s. 2. *In re* MOUNT EDGCUMBE (EARL) **Harman J. 615**

1943

War Damage Act, 1943 (6 & 7 Geo. 6, c. 21) ss. 12, 33, 123. *In re* 38, 39 AND 40, WINDMILL STREET, ST. PANCRAS, LONDON - - **Vaisey J. 308**

— s. 12, sub-ss. 2, 3, s. 123. *In re* JOHNSTONE'S APPLICATION

Harman J. 524

Acquisition of Land (Authorisation Procedure) Act, 1946 (9 & 10 Geo. 6, c. 49), s. 2, sub-ss. 2, 3. **LAND REALISATION CO., LD. v. POSTMASTER-GENERAL** **Romer J. 435**

1946

Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6, c. 59), ss. 5, 7; sch. I, para. 9; sch. II, paras. 1, 2. **NATIONAL COAL BOARD v. HORNBY**

Vaisey J. 10

— s. 22, sub-s. 3 (c). **NEW ROCK COLLIERY CO. LD. v. MINISTER OF FUEL AND POWER** - **C. A. 118**

National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81). *In re* MORGAN'S WILL TRUSTS. **LEWARNE v. MINISTER OF HEALTH** - **Roxburgh J. 637**

— s. 6, sub-s. 1; s. 7, sub-ss. 1, 10; s. 60, sub-s. 1. *In re KELLNER'S WILL TRUSTS. In re NATIONAL HEALTH SERVICE ACT, 1946. BLUNDELL v. ROYAL CANCER HOSPITAL* - - **C. A. 46**

— s. 6 sub-ss. 1 2; s. 7, sub-ss. 4, 9(a) 10. *MINISTER OF HEALTH v. FOX* - - **Wynn-Parry J. 369**

1947

Treaties of Peace (Italy rumania Bulgaria Hungary and Finland) Act 1947 (10 & 11 Geo. 6 c. 23) s. 1. *REPUBLIC OF ITALY v. HAMBROS BANK LD. AND GREGORY (CUSTODIAN OF ENEMY PROPERTY)* **Vaisey J. 314**

Transport Act, 1947 (10 & 11 Geo. 6, c. 49), s. 16, sch. V, Part I, para. 5. *MUNICIPAL AND GENERAL SECURITIES LD. v. LLOYDS BANK* **Wynn-Parry J. 212**

Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 37, sub-ss. 3, 4. *LAND REALISATION CO., LD. v. POSTMASTER-GENERAL* **Romer J. 435**

— s. 81. *In re NAYLOR BENZON MINING CO., LD.* **Wynn-Parry J. 567**

Electricity Act, 1947 (10 & 11 Geo. 6, c. 54), s. 20, sch. III, Part I, para. 5. *MUNICIPAL AND GENERAL SECURITIES LD. v. LLOYDS BANK* **Wynn-Parry J. 212**

1948

Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 94, 319. *WESTMINSTER CORPORATION v. HASTE* **Danckwerts J. 442**

— s. 319, sub-ss. 1, 4. *In re PRIM-ROSE (BUILDERS), LD.* **Wynn-Parry J. 561**

— s. 325, sub-s. 1 (c). *In re GROSVENOR METAL CO., LD.* **Vaisey J. 63**

— s. 372. *In re WELSH ANTHRACITE COLLIERIES LD. INDUSTRIAL & GENERAL TRUSTS LD. v. THE COMPANY* - **Vaisey J. 18**

— s. 447. *TUDOR FURNISHERS LD. v. MONTAGUE & CO. AND FINER PRODUCTION CO. LD.* **Wynn-Parry J. 113**

Children Act, 1948 (11 & 12 Geo. 6, c. 43), s. 53. *In re STERN. STERN v. STERN* - - **Romer J. 550**

Gas Act, 1948 (11 & 12 Geo. 6, c. 67), s. 25, sch. II, Part I, para. 5; Part II, para. 2. *MUNICIPAL AND GENERAL SECURITIES LD. v. LLOYDS BANK* **Wynn-Parry J. 212**

1949

Law Reform (Miscellaneous Provisions) Act, 1949 (12 & 13 Geo. 6, c. 100), s. 8, *In re WESTBY'S SETTLEMENT. WESTBY v. ASHLEY* - **C. A. 296**

— s. 9. *In re AN INFANT* **Roxburgh J. 629**

RULES AND ORDERS JUDICIALLY CONSIDERED

R. S. C. Or. 31, rr. 12, 14. SPEYSIDE ESTATE AND TRUST CO., LD. v. WRAYMOND FREEMAN (BLENDERS) LD. (IN LIQUIDATION) **Wynn-Parry J. 96**

— *Or. 65, r. 6. TUDOR FURNISHERS LD. v. MONTAGUE & COMPANY AND FINER PRODUCTION CO. LD.* **Wynn-Parry J. 113**

Management of Patients' Estates Rules, 1934, r. 148. In re WESTBY'S SETTLEMENT. WESTBY v. ASHLEY **C. A. 296**

Trading with the Enemy (Custodian) Order, 1939 (St. R. & O. 1939, No. 1198) para. 1 (i); para. 3 (i) (ii). *REPUBLIC OF ITALY v. HAMBROS BANK LD. AND GREGORY (CUSTODIAN OF ENEMY PROPERTY)* **Vaisey J. 314**

Treaty of Peace (Italy) Order 1948 (S.I. 1948 No. 117) para. 1 (1) (2). *REPUBLIC OF ITALY v. HAMBROS BANK LD. AND GREGORY (CUSTODIAN OF ENEMY PROPERTY)* **Vaisey J. 314**

INTERNATIONAL INSTRUMENTS JUDICIALLY CONSIDERED

1947

Treaty of Peace with Italy 1947, art. 79, paras. 1, 2, 3. REPUBLIC OF ITALY v. HAMBROS BANK, LD. AND GREGORY (CUSTODIAN OF ENEMY PROPERTY) - **Vaisey J. 314**

ERRATA

Page 103. For *Berry v. Green* read *Berry v. Geen*.

Page 203. For *Wynn-Parry L.J.* read *Wynn-Parry J.*

CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

In re GALWAY'S WILL TRUSTS.

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LOWTHER *v.* GALWAY (VISCOUNT) AND OTHERS.

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Mines and minerals—Coal—Will made in 1922—Devise and bequest of residue—Codicil made in 1927 revoking that disposition and devising and bequeathing (inter alia) mines and minerals—Second codicil undated revoking annuity given by first codicil and otherwise confirming will and first codicil—Coming into force of Coal Act, 1938—Third codicil made in 1941 confirming will save as revoked or varied by first and second codicils and confirming also those codicils—Death of testator in 1943 absolutely entitled to freeholds—Coal under surface—Testator at date of death without interest in coal and interested only in compensation directed by Act to be paid to owners—Devolution of compensation money—Coal Act, 1938 (1 & 2 Geo. 6, c. 52).

*June 24, 27;
July 13.*

By a codicil made in 1927 the testator revoked a bequest of residue in his will made in 1922 and left his real and personal estate to his trustees on trust “(a) as to all my unsettled estates “in Nottinghamshire and Yorkshire including the mines and “minerals thereunder” subject to an annuity to the use of his eldest son for life with remainders as therein mentioned, “(b) as “to all the remainder of my personal estate not hereby otherwise “disposed of” for his eldest son on his attaining the age of 21 years. By a second, undated, codicil the testator revoked an annuity given by the first codicil and subject to that revocation confirmed that codicil and his will. By a third codicil made in 1941 he revoked a specific bequest for which he substituted another and subject to those alterations confirmed his will save

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in so far as varied or revoked by the first and second codicils, which also he confirmed. In 1943 he died, being then absolutely entitled to freeholds. They had coal beneath, but he had then an interest not in the coal but only in the compensation money for it arising under the Coal Act, 1938, the valuation date under which was January 1, 1939, and the vesting date July 1, 1942. The amount of the compensation was fixed in or about March, 1944, and paid in or about February, 1945.

On a summons by the surviving executor of the will and codicils to determine, *inter alia*, whether the compensation was included in the gift in the first codicil of "all my unsettled estates in Nottinghamshire and Yorkshire including the mines and minerals thereunder" or in the gift therein of the residuary personal estate :

Held, in deciding that it passed under the gift of the residuary personal estate : (1.) that there was a clear ademption and that the testator could not be held to have intended, by republishing his will by a codicil dated after the valuation date, that the compensation money should pass under the devise of mines and minerals and to have sufficiently expressed that intention ; *Drinkwater v. Falconer* (1755) 2 Ves. Sen. 622, and *Powys v. Mansfield* (1837) 3 Myl. & Cr. 359, followed ; (2.) that, since even the entering into a contract for sale sufficed to work an ademption, a fortiori did the completion of a contract for sale, as in the present case, so suffice ; *Watts v. Watts* (1873) L. R. 17 Eq. 217 applied ; (3.) that the court was not precluded from coming to that conclusion by the modern decisions which dealt with the conversion by the Law of Property Act, 1925, of an undivided share in real estate into personal property and which emphasized that the owners of those undivided shares still had an interest in the real estate under the statutory trust for sale, because the provisions of the Coal Act, 1938, were not, as were the statutory trusts for sale, a mere conveyancing device leaving the position of the owner substantially unaffected, but constituted a statutory disappropriation in favour of the State, subject to the payment of compensation.

ADJOURNED SUMMONS to determine whether a devise of mines and minerals contained in a codicil made before the coming into force of the Coal Act, 1938, which codicil was substantially confirmed by another codicil made after the coming into force of that Act and after the valuation date therein appointed by a testator who died after the vesting date, operated on the compensation money arising under the Act, or whether the devise was adeemed and the compensation money passed under the testator's residuary bequest.

The testator by his will, dated June 24, 1922, devised and bequeathed his residue in terms which he revoked by his first codicil. By cl. 3 of that codicil, dated November 2,

1927, he devised and bequeathed his real and personal estate to his trustees on trust: "(a) as to all my unsettled estates " in Nottinghamshire and Yorkshire, including the mines and " minerals thereunder " subject to an annuity to the use of his eldest son (the first defendant to this summons) for life, with remainders in tail under which the second, third, fourth and fifth defendants were interested, "(b) as to my New Monckton " Colliery Shares " as there mentioned, "(c) . . . as to all " the remainder of my personal estate not hereby otherwise " disposed of " for the first defendant absolutely contingently on his attaining the age of 21 years with remainders over if he failed to attain that age. By a second, undated, codicil, reciting cl. 7 of the first codicil, the testator revoked an annuity thereby given and in other respects confirmed his will and his first codicil.

On July 29, 1938, the Coal Act, 1938, received the Royal Assent (1).

(1) Coal Act, 1938, s. 3, sub-s. 1: " The Commission shall acquire " in accordance with the provisions " of this Part of this Act the " fee simple in all coal and mines " of coal, together with such " property and rights annexed " thereto and such rights to " withdraw support as are herein- " after mentioned, subject to such " servitudes, restrictive covenants " and other matters adversely " affecting any of the said coal " or mines as are hereinafter " mentioned, and subject to the " provisions of this Part of this " Act with respect to the retention " of interests arising under coal- " mining leases and of certain " other interests."

Sub-section 2: " During the " period between the first day " of January, 1939 (in this Act " referred to as the ' valuation " ' date ') and the first day of July, " 1942 (in this Act referred to as " the ' vesting date ') all coal " and mines of coal shall be held " as if all the existing owners " thereof had, in respect of all " their interests therein other

" than retained interests and with " full capacity so to do, entered " into a contract on the valuation " date for the sale thereof to " the Commission, at a price to " be ascertained by valuation, " with provision for completion " of the contract on the valuation " date."

Sub-section 3: " On the " vesting date all coal and mines " of coal as existing at that date " shall vest in the Commission " for a title comprising all interests " then subsisting in any such " coal or mine other than retained " interests."

Section 6, sub-s. 1: " The " Commission shall pay, as com- " pensation to owners for the " acquisition of their interests, " sums ascertained in accordance " with the provisions of this " and the next succeeding section " in respect of all coal and mines " of coal, of all acquired property " and rights, and of all rights to " withdraw support that are to " vest in the Commission under " Part II of the Second Schedule " to this Act."

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By a third codicil dated August 16, 1941, the testator revoked a specific bequest to his wife and substituted another specific bequest to her : and, subject as aforesaid, he confirmed his will except in so far as varied or revoked by his first and second codicils and he confirmed those codicils. On March 27, 1943, he died. At that date he was absolutely entitled to freehold estates in Nottinghamshire and Yorkshire under which were mines and coal. The compensation for the acquisition of his coal interests had not then been assessed : it was fixed in or about March, 1944, and paid in or about February, 1945, and, after discharge of certain incumbrances, there remained in the hands of the sole surviving executor and trustee of the will and codicils (who was also one of the two trustees for the purposes of the Settled Land Act, 1925, of the settlement thereby constituted) the sum of 46,025*l.* of compensation money.

By this summons, taken out on March 29, 1949, the executor and trustee of the will and codicils asked, *inter alia*, whether, on the true construction of the first and third codicils, the compensation was included in the gift in the first codicil of "all my unsettled estates in Nottinghamshire and Yorkshire, "including the mines and minerals thereunder," or in the gift in the same codicil of the testator's residuary personal estate. The defendants to the summons were the testator's son, daughters and widow, and the other trustee of the settlement constituted by the will and codicils.

Wilfrid M. Hunt for the plaintiff. A case very similar to this was before Evershed J. in *In re Hatfeild* (1).

R. W. Goff for the son. The gift in the first codicil has been adeemed by the effect of the Coal Act, 1938, and the compensation moneys pass as part of the testator's personal estate. The Act created a statutory contract (for the sale by owners of their interests to the Commission) and its vesting machinery, whereunder the Commission acquired all coal and mines of coal, divested owners of those interests.

There is a long line of authority establishing that, where there has been ademption—as there has been in the present case by reason of the coming into being of a contract for sale as from the valuation date (secs. 3, sub-s. 2)—a codicil confirming the will (and, in this case, the first codicil) and executed after

the event giving rise to the ademption will not restore the gift¹: *Hopwood v. Hopwood* (1); *Sidney v. Sidney* (2); *Macdonald v. Irvine* (3); *Drinkwater v. Falconer* (4); *Powys v. Mansfield* (5). In *In re Price* (6), Clauson J. held that, qua the beneficiaries, the imposition of the statutory trusts for sale by the Law of Property Act, 1925, converted land into money, with the result, in the case before him, that the testator, who died possessed of land, acquired an equitable interest in a corresponding share of the proceeds of sale and what passed to his executors was an absolute interest in personalty. In *In re Mellish* (7) a testator held one-ninth undivided share of an estate and another one-ninth share of the proceeds of sale of another one-third. He devised all his share "and interest" in the estate and Eve J. held that the statutory trusts did not adeem the devise. Tomlin J. followed that decision in *In re Wheeler* (8), in which case there was a confirmatory codicil. In *In re Kempthorne* (9) however, in which there was no confirmatory codicil, Maugham J., taking the view that *In re Mellish* (7) and *In re Wheeler* (8) did not decide the point before him and did not really conflict with the decision in *In re Price* (6), followed Clauson J.'s decision in that case and held that the testator's interest in undivided shares of freehold property was, as from January 1, 1926, converted into personal property and passed on his death under the gift of personal property in his will: and in *In re Newman* (10), Farwell J., distinguishing *In re Mellish* (7) on the ground that the word "interest" occurred in that case but not in the case before him and *In re Wheeler* (8) on the ground that in that case there was a confirmatory codicil but in the case before him there was not, applied *In re Kempthorne* (9) and held that the statutory trusts did adeem a specific devise. True, in *In re Warren* (11), Maugham J. held that, where a will made before 1926 and devising an undivided share in land had been confirmed by a codicil made after 1926 which did not mention the land, the operation of the statutory trusts did not adeem the devise and the proceeds of sale went absolutely to the devisee. That case, however,

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(1) (1859) 7 H. L. C. 728.

(2) (1873) L. R. 17 Eq. 65.

(3) (1878) 8 Ch. D. 101.

(4) (1755) 2 Ves. Sen. 622.

(5) (1837) 3 Myl. & Cr. 359.

(6) [1928] Ch. 579.

(7) Not reported. See [1929]
2 K. B. 81, 82.(8) *Ibid.* 81 n.

(9) [1930] 1 Ch. 268.

(10) [1930] 2 Ch. 409.

(11) [1932] 1 Ch. 42.

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is distinguishable from the present case because the court there relied on the circumstance that the testatrix retained, in substance, an interest in the land. Here, the testator did not retain any interest of any sort or kind in the coal. At his death his interest was in the compensation money only. In *In re Harvey* (1), which is the most recent decision on the subject, Vaisey J. followed *In re Warren* (2). Even an uncompleted contract for the sale of the subject-matter of a gift will work an ademption: *Watts v. Watts* (3): a fortiori will a contract which, as in the present case, has been completed in the testator's lifetime do so.

The position is that the testator had the mines and minerals when he made his will but before his death had by operation of law been deprived of them and had received something entirely different, namely, the statutory right to compensation. The contention that the compensation is included in the gift of mines and minerals in the first codicil constitutes an attempt to obtain something which was never mentioned in the will: and the court ought to hold that it is included in the gift in that codicil of the testator's residuary personal estate.

N. Methven for the daughters, the widow and the other trustee of the settlement. True it is that in *In re Kempthorne* (4) Maugham J. took the view that *In re Wheeler* (5) and *In re Mellish* (6) did not decide the point with which he was dealing. It is also to be remembered that, in *In re Wheeler* (5), Tomlin J. regarded Eve J. as having decided that, in *In re Mellish* (6), there was no ademption by reason of the coming into force of the Law of Property Act, 1925. Moreover, while it is quite accurate to say that Maugham J., in *In re Warren* (2), did rely on the circumstance that the testatrix retained, in substance, an interest in the land, it is equally important that he distinguished *In re Newman* (7) because there was no confirmatory codicil in that case but there was a post-1925 codicil in the case before him: and in the course of his judgment, he said (8): "I attribute weight in these cases to the "consideration that the result of the statutory trusts is not "wholly to deprive the person previously entitled to an

(1) [1947] Ch. 285.

(2) [1932] 1 Ch. 42.

(3) (1873) L. R. 17 Eq. 217.

(4) [1930] 1 Ch. 268.

(5) [1929] 2 K. B. 81 n.

(6) Not reported. See [1929]

2 K. B. 81, 82.

(7) [1930] 2 Ch. 409.

(8) [1932] 1 Ch. 42, 50.

"undivided share of all the interest in the land : and " these next words are important " the language of the testator may " well be such that that consideration may result in the " decision that there is no ademption." That makes it clear that the language of the testator is quite as important a factor as the circumstance that an interest in the land is retained : and in the present case both the language of the first and the date of execution of the third codicil make the testator's intention abundantly clear. Of *Powys v. Mansfield* (1)—one of the cases in the "long line of authority" relied on for the son—Maugham J. said (2) : "I am not satisfied that the same " result should follow where an alteration in the nature of " property has taken place by operation of law, and the " testator by a codicil has confirmed his will after the alteration " of the law." Having, in *In re Kempthorne* (3), taken the view that *In re Mellish* (4) and *In re Wheeler* (5) did not decide the point before him—not, be it noted, the view that they were wrong—Maugham J. ended his judgment in *In re Warren* (6) with the words : " . . . without saying that I rely on " *In re Wheeler* (5), I am glad to think that, in substance, I am " following the line of thought which commended itself to the " court in that case." Finally, in *In re Harvey* (7), Vaisey J. referred to Maugham J.'s reluctance in *In re Warren* (8) to follow *In re Newman* (9) and to Maugham J.'s having been able to distinguish *In re Newman* (9) because there was a post-1925 codicil in *In re Warren* (6) : and Vaisey J. made exactly the same distinction between *In re Newman* (9) and *In re Harvey* (7).

In the present case, at the date of the third codicil the testator still had the mines and minerals : that is quite arguable, notwithstanding that the valuation date was then past and notwithstanding the provisions of s. 3, sub-s. 2 with regard to that date. The important thing is that the vesting date was not yet past. Of course, the testator must have known that coal mines were ultimately to be nationalized : but he knew also that he had substantial interests of which to dispose. The position might and probably would have been different had he himself sold his coal interests to private

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(1) 3 Myl. & Cr. 359.

(2) [1932] 1 Ch. 42, 52.

(3) [1930] 1 Ch. 268.

(4) Not reported. See [1929]

2 K. B. 81, 82.

(5) *Ibid.* 81 n.

(6) [1932] 1 Ch. 42, 53.

(7) [1947] Ch. 285.

(8) [1932] 1 Ch. 42.

(9) [1930] 2 Ch. 409.

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purchasers and it might not then have been arguable that the purchase money received by him was impressed with the trusts which he himself had created of those interests while they were still his. What actually happened was that he had to part with his interests whether he was or was not willing to do so : and the very fact that he executed the 1941 codicil after the valuation date is a strong indication that he wished the compensation money to pass under the devise of mines and minerals. He has made that intention quite clear and, accordingly, the court, in the light of *In re Mellish* (1), *In re Wheeler* (2), *In re Warren* (3) and *In re Harvey* (4), ought to give effect to it.

Cur. adv. vult.

July 13. HARMAN J. read the following judgment, in which he stated the facts substantially as set out above and also the effect of the relevant sections of the Coal Act, 1938, and continued :

It results from the foregoing review of the Act that on January 1, 1939, the testator was put into the position of a man who had contracted to sell the whole of his coal interests to the Coal Commission at a price to be ascertained by valuation and that on July 1, 1942, that contract was to be deemed completed and the legal interest of the testator in the coal vested in the Commission as the equitable interest had done at the valuation date. It seems therefore that when he died in March, 1943, the testator had no interest in the coal under his properties. His only interest was in the compensation not then yet assessed. This was in fact fixed in about the month of March, 1944, and received somewhat later, and after discharge of certain encumbrances there remains in the hands of the plaintiff a sum of about 46,000*l.* of compensation money.

The question in this case is whether the devise in strict settlement contained in cl. 3 of the first codicil of the testator's estates including the mines and minerals thereunder operates upon this compensation money or whether the devise was adeemed by the events which happened and the compensation money passes under the testator's residuary bequest. At first sight the answer looks plain enough. The testator at the date of his death, from which for this purpose his will

(1) Not reported. See [1929] 2 K. B. 81, 82.
(2) Ibid. 81 n.
(3) [1932] 1 Ch. 42.
(4) [1947] Ch. 285.

speaks, had no coal or mines of coal or minerals and there is a clear case of ademption. It is, however, suggested on behalf of the testator's widow and daughters that by republishing his will by a codicil dated after the valuation date the testator must be held to have intended that the compensation money should pass under a devise of mines and minerals, and to have sufficiently expressed that intention. I cannot accept this. It is old law, at least as old as Lord Hardwicke L.C., that a republication cannot operate to make good a legacy once adeemed: see the judgment in *Drinkwater v. Falconer* (1). See also *Powys v. Mansfield* (Lord Cottenham's decision) (2). The cases indeed show that even a contract to sell will work an ademption. See the decision of Hall V.-C. in *Watts v. Watts* (3). Much more so, therefore, will a contract which has been brought to completion as this one was in the testator's lifetime. It is said, however, that there is a modern line of authority which prevents me coming to this conclusion and my attention was drawn to a number of cases connected with the subject of the conversion into personal property by the Law of Property Act, 1925, of an undivided share in real estate. The earlier cases, and in particular Clauson J.'s decision in *In re Price* (4), seem to have accepted the conversion worked by the Act of 1925 at its full value, but it seems to me that this was seen to defeat the intention of testators and the more recent cases, in particular *In re Warren* (5) and *In re Harvey* (6), have emphasized the fact that the owner of an undivided share in real estate still has an interest in the real estate under the statutory trusts for sale which are, after all, only a conveyancing device for avoiding the complication of partition actions and it has therefore been held that a confirmatory codicil made after 1926 may save from ademption by the legislation of 1925 an undivided share in real property. Those cases seem to me to have very little to do with the present. Here there was no conveyancing device leaving a man substantially in the same position as before, but a real statutory disappropriation of the proprietor in favour of the State subject to the payment of statutory compensation. I ought, perhaps, to add that a question akin to this appears to have been decided by Evershed J. (as he then was) in a case of *In re Hatfeild* (7).

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(1) 2 Ves. Sen. 622, 626.

(2) 3 Myl. & Cr. 359, 375, 376.

(3) L. R. 17 Eq. 217.

(4) [1928] Ch. 579.

(5) [1932] 1 Ch. 42.

(6) [1947] Ch. 285.

(7) 198 L. T. Jour. 55.

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I hold that on the true construction of the testator's will and codicil the compensation to which the testator was entitled at his death under the Coal Act passed under the gift of the testator's residuary personal estate.

Declaration accordingly.

Solicitors for all parties : *Bell, Brodrick & Gray*, for Jones,
Smith & Pearson, East Retford.

K. R. A. H.

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July 20, 21,
22, 29.

NATIONAL COAL BOARD *v.* HORNBY.

[1948 N. 576]

Mines and minerals—Specific performance—Farm—Agreement with colliery company containing option to purchase—Acquisition by National Coal Board of company's interest in the land—Effect on option—Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6, c. 59), ss. 5, 7 ; sch. I, para. 9 ; sch. II, paras. 1, 2.

An agreement in writing was entered into with A. on April 4, 1938, by a company which was at all material times a " colliery " concern " within the meaning of that expression as used in the Coal Industry Nationalisation Act, 1946. By one term of the agreement A. granted to the company for valuable consideration an option to purchase a farm at any time within ten years from the date thereof at the price of 13,000*l.* By a notice in writing, dated February 18, 1948, and served on A., the National Coal Board, purporting to exercise the option, required that the property be conveyed to them in accordance with the provisions of the agreement.

Held, that the agreement was entered into by the company for the ultimate purpose of getting coal and that, under the material provisions of the statute, it was a contract in favour of and against the plaintiff Board to the extent requisite for placing them in the position of the company for the purposes for which they sought to be so placed, and that there must be an order for specific performance of the agreement for the sale of the premises to the plaintiffs.

WITNESS ACTION.

On April 4, 1938, an agreement in writing was made between Francis Hornby the first defendant, (therein called " the " grantor "), of the one part and The Lilleshall Co. Ltd. (therein and hereinafter called " the Company ") of the other part.

The company was at all material times a "colliery concern" within the meaning of that expression as used in the Coal Industry Nationalisation Act, 1946, namely, a company whose business included the working of coal as more particularly defined in s. 63, sub-s. 1, of the Act.

By cl. 1 of the agreement, it was declared and provided that, in consideration of a yearly sum of 10*l.* payable as therein mentioned by them to him, the grantor granted to the company an option to purchase at any time within ten years from the date thereof at the price of 13,000*l.* the property described in the schedule thereto. That property consisted of certain lands and buildings at Lilleshall in Shropshire known as New Lodge Farm, comprising an area of about 329 acres, and it was a farm within the definition contained in para. 25 of sch. I to the Act.

Clause 2 of the agreement prescribed the method of payment of the said sum of 10*l.*, and cl. 3 contained provisions to the following effect: The option was to be exercised by the company giving notice in writing to the grantor, and upon that being done the grantor was to be deemed to have agreed to the purchase of the property at the price aforesaid; the purchase money was to be paid and the purchase completed within six weeks of the receipt of the notice by the grantor. An abstract of the grantor's title to the property was to be delivered within seven days of the receipt of the notice. Vacant possession of the property was to be given to the company on completion, but the company was on completion to let to the second defendant, Frank Hornby (son of the grantor), and the grantor was to procure the said Frank Hornby to take the said property (other than any part thereof which might then be required by the company for its immediate purposes) from year to year at the yearly rent of 500*l.* (or at a reduced rent proportionate to the acreage let if any part should be so required by the company as aforesaid), and otherwise upon the terms and conditions of a tenancy agreement to be prepared by the company's solicitors, and to contain in addition to the usual terms and conditions a provision authorizing the company to resume possession on giving one month's notice in writing of any part of the said property for any purpose in connexion with the company's business or for the purpose of building or estate development or for any other purpose not being the use of the property for agriculture.

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By a deed of gift dated May 4, 1945, and made between the grantor of the one part and the second defendant and his sister, the third defendant, Muriel Hornby, of the other part, the property was conveyed to the second and third defendants in fee simple. They acquired the property with full notice of the agreement, which, however, made no reference either to the executors, administrators or assigns of the grantor or to the assigns of the company.

The plaintiffs, the National Coal Board, were established by ss. 1 and 2 of the Act.

By a notice in writing dated February 18, 1948, and served on the first defendant on or shortly after that day, the plaintiffs purported to exercise the option granted by the said agreement and required the first defendant to convey the said property to them in accordance with the provisions of the agreement. As he failed to comply with the notice they claimed specific performance of the agreement for sale constituted by the said agreement and the notice.

Jopling for the plaintiffs.

Baden Fuller for the defendants.

Cur. adv. vult.

July 29. VAISEY J., reading a judgment, stated the facts and continued: The right of the plaintiffs to the relief which they seek would appear to rest entirely on the provisions of the Coal Industry Nationalisation Act, 1946 (which I will call "the Coal Act" or "the Act") and the proper method of applying those provisions to the agreement of April 4, 1938. The company is and was a colliery concern, and the substantial question for my decision may be shortly stated as being the question whether the plaintiffs, having served the notice of February 18, 1948, are entitled to enforce the rights and liable to be subjected to the obligations which the company could have enforced and would have been liable to under the said agreement of April 4, 1938, in accordance with its terms, if the Coal Act had not been passed. The notice was admittedly served and received within the proper time and no point has been, or probably could have been, taken that the notice should have been served on the second and third defendants instead of or in addition to the first defendant.

The defendants resist the plaintiffs' claim not on the ground but for the reason (as I must suppose) that they think that

the property is now worth more than 13,000*l.*, or possibly they are actuated by some sentimental or similar considerations. Their case is wholly unmeritorious in this sense—that they would admittedly have been bound by the agreement if the Coal Act had not been passed, and would have had no defence if an action similar to the present had been brought against them by the company.

Their case really depends on their establishing that the provisions of the Act have incidentally and fortuitously invalidated the agreement by discharging them from their obligations thereunder. The plaintiffs, on the other hand, say that they have, under and by virtue of the Act, become and now are the successors in title of the company and stand in the place of the company for all the relevant purposes of the agreement.

The case for the defendants has been argued with much force and ingenuity by their counsel, Mr. Baden Fuller, who has led me through the tortuous mazes of the Coal Act with the object of proving that the plaintiffs are not the company's successors in title for the relevant purposes of such succession. He argues that their title is defective or non-existent, or that, at any rate, it has not been proved.

The plaintiffs by s. 1, sub-s. 1 of the Coal Act are on and after a date defined in the Act as the primary vesting date (which was in fact January 1, 1947) charged with (among other duties) that of working and getting the coal in Great Britain to the exclusion of every other person and company. To enable them to discharge that duty, the assets of the so-called colliery concerns are transferred to them under the extremely elaborate provisions of a fasciculus of sections—5 to 9 inclusive—of the Act.

The scheme may be briefly stated as follows: Certain assets or classes of assets, described in Part I of sch. I to the Act, are to vest in the plaintiffs automatically on the primary vesting date. (See s. 5, sub-s. 1.) Other assets or classes of assets, described in Part II of the same schedule, are so to vest at the option of either the owners thereof or the plaintiffs exercisable by the service of a notice on the other of them (see s. 5, sub-s. 2); and further assets or classes of assets (described in Parts III and IV of the said sch. I) are so to vest under conditions which I need not specify (see s. 5, sub-ss. 3 and 4).

The main contention of the defendants is that the company's

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interest in the said agreement of April 4, 1938, is an asset which falls within Part II of sch. I, and has never vested in the plaintiffs for the reason that neither the company nor the plaintiffs have ever served the other with the requisite option notice. The defendants point to para. 14 in the said Part II, which refers to "interests of colliery concerns in farms." They say that New Lodge Farm is unquestionably a farm; and they say that the agreement of April 4, 1938, conferred an interest in a farm on the company. In support of this proposition they cite the well-known authorities of *London & South Western Railway Co. v. Gomm* (1) and *Woodall v. Clifton* (2); and they say that the requisite notice under s. 5, sub-s. 2 of the Coal Act has never been served.

This last fact is admitted, and I will say at once that the omission is, in my judgment, extremely regrettable and not at all easy to explain or justify. The reference to farms in para. 14 of Part II of sch. I to the Act cannot have escaped the notice of the officials and legal advisers of the plaintiffs. The service of the appropriate notice would, it is true, have been a purely formal act, but it would have placed the matter beyond the reach of controversy and would have made it almost certain that this action would never have been brought. It would have established the plaintiffs' rights and freed them from the technical objection on which the defendants have placed reliance. The service of the notice *ex abundanti cautela* was so obvious and so simple a precaution that I confess surprise that the plaintiffs did not take it. I might go so far as to say that I think they were careless, but they may have grounds of legitimate excuse of which I am not informed.

The plaintiffs' case may be stated as follows: They say that the company's rights and interests under the agreement of April 4, 1938, have passed to them either as comprised in Part I of sch. I, or, alternatively, by the operation of s. 7 of the Act. That section provides that the contracts mentioned in sch. II to the Act shall have effect in favour of or against the plaintiffs as and to the extent therein mentioned. The plaintiffs say that the agreement of April 4, 1938, is such a contract.

I have come to the conclusion that the Act in its application to that agreement contains provisions which are to some extent both contradictory and cumulative. If s. 5, sub-s. 2, and Part II of sch. I had stood alone, the company's interests

(1) (1882) 20 Ch. D. 562.

(2) [1905] 2 Ch. 257.

under the said agreement would plainly, in my judgment, have come within their ambit. But I would say the same if s. 5, sub-s. 1 and the first part of sch. I had stood alone ; and if s. 7 and sch. II had stood alone.

The contention that the agreement must fall to be dealt with either under s. 5, sub-s. 2, or under s. 5, sub-s. 1, or under s. 7, and that those alternatives are mutually exclusive in the sense that it cannot be held to fall within more than one of them, may be and I think is true, in one sense, and if a case arose as between the plaintiffs and a colliery concern which made it of importance to decide the question into which compartment (so to speak) of the concern's cupboard full of assets a particular item of property such as the agreement of April 4, 1938, had to be placed, then in such circumstances the question would have to be faced and decided.

But if the colliery concern and the plaintiffs choose to treat such an asset as coming under any one or any two of the three possible heads and as excluded from the others or other of such heads, I do not see why the choice could not be effectively made.

Have the plaintiffs and the company in the present case made such a joint election and chosen to put the agreement into s. 5, sub-s. 1, or into s. 7, or one of them and to exclude it from s. 5, sub-s. 2 ?

Mr. Jopling, for the plaintiffs, alleged, but has not proved, that there is a document in the form of a schedule of assets which plainly establishes that they have done so. It is a matter for great regret and some comment that such evidence was not produced at an early stage of the proceedings ; but in the absence of evidence, I cannot accept that contention in that form.

But witnesses were called before me whose testimony, and indeed whose very presence in the witness-box, suffices to satisfy me that the company had assumed and admits and could not now be heard to deny that its rights and interests under the agreement have passed from it to the plaintiffs.

The witnesses in question include a Mr. Fielden, who has been a director of the company since 1933 ; a Mr. Willis Brown, who was manager of the company from March, 1936, until 1940, when he became joint managing director, becoming sole managing director in 1945 ; and a Mr. Machin, who held responsible positions in the company in and after 1938.

If the company had wished at any time to assert that its

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interests under the agreement of April 4, 1938, were only to pass to the plaintiffs in the event of the service of an option notice under s. 5, sub-s. 2 of the Act, I think it is now far too late for them to do so. I am satisfied by the evidence that the company entered into the agreement in the course of or for the purpose of coal industry activities as defined in the Act, and that its interest thereunder was acquired and held for the purpose of having land available for use for coal industry or transferred allied activities as so defined.

So holding, I come to the conclusion that the matter is or can be and has been brought within para. 9 of Part I of sch. I to the Act. Other relevant paragraphs in that Part are Nos. 1 and 2. See also para. 22 in Part V. It further follows (as it seems to me) that the agreement of April 4, 1938, is a contract coming within s. 7 of the Act and para. 1 of sch. II to the Act, and I think that it has effect in favour of and against the plaintiffs to the extent requisite for placing them in the shoes of the company for the purposes for which they seek to be so placed.

The agreement is a composite document. It creates interests in coal-bearing land; it creates interests in a farm; and it is a contract. It is, therefore, a document which is not easy to place, or which is perhaps too easy to place. It seems to be doubly or trebly qualified; that is, qualified for entry into more than one compartment of the cupboard to which I have metaphorically referred.

The complexities of the Act are very great and offer a congenial and fruitful field for dialectical discussion. But the basic fact remains (as I believe and hold) that the agreement was entered into by the company for the ultimate purpose of getting coal. It lies in the middle of seams which were being and were intended to be worked by the company; it was and is a part of their undertaking as colliery proprietors. It would be a remarkable result if the omission to serve an option notice under s. 5, sub-s. 2 of the Act had left this interest suspended in the air when all the other colliery assets of the company had passed to the plaintiffs.

If necessary, I suppose the company could, for the purpose of quieting the plaintiffs' title, execute a confirmatory assurance of some kind in their favour, though I should have thought it quite unnecessary for them to do so.

I decree specific performance of the agreement for the sale of the premises to the plaintiffs.

As to the costs of the action I have felt some difficulty. Normally, of course, the plaintiffs would be entitled to their costs against the defendants who have resisted their claim to the relief to which I have held them to be entitled. But as the whole trouble might have been avoided if the plaintiffs had been better acquainted with the terms of the Act to which they owe their existence and had acted with greater caution, I shall not order the defendants to pay all or any part of their costs of the action down to the date of this order. The defendants must, however, pay the plaintiffs' subsequent costs, that is, their costs incurred from and after the passing and entering of this order.

I have considered whether it would not be fair for me to order the plaintiffs to pay all or part of the defendants' costs down to the date of this order ; but the merits of the defendants do not, in my judgment, justify so unusual a concession to be made to them in their position of unsuccessful defendants.

Some attempts were made to persuade me that the defendants' position under the agreement is more onerous and less attractive than it would have been if the legislature had not substituted the plaintiffs for the company as a contracting party thereunder. But even if those attempts had been successful—and they have not been successful—I doubt whether I should have dealt with the costs otherwise than I am now doing by my order that each party must bear their own costs down to and including this order, and that the subsequent costs of both parties must be borne and paid by the defendants.

I will also direct an inquiry as to title and there will be liberty to apply.

Solicitors : Solicitor, National Coal Board ; Gibson & Weldon for Lloyd & Robinson, Stafford.

J. L. D.

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Oct. 19, 20.

In re WELSH ANTHRACITE COLLIERIES LD.
INDUSTRIAL & GENERAL TRUSTS LD.
v. THE COMPANY.

[1937 W. 685]

Company—Receiver—Information—Whether statutory provisions retrospective—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 372.

Section 372 of the Companies Act, 1948, constitutes a code for the guidance and direction of receivers after the coming into operation on July 1, 1948, of that statute; its provisions are not retrospective and do not affect the position or increase the duties of a receiver who was appointed before the date on which the statute came into force.

PROCEDURE SUMMONS.

This summons was taken out by the debenture holders of Welsh Anthracite Collieries Ltd. to determine whether Sir William Henry Peat, the receiver appointed by an order of the court, dated March 2, 1937, was bound to send to the Registrar of Companies and to all holders of 6½ per cent. first mortgage debenture stock of the company and to the Trustees Corporation Ltd. (the trustees of the relevant trust for securing that stock) any abstract of his receipts and payments, pursuant to sub-s. 2 of s. 372 (1) of the Companies

(1) Companies Act, 1948, "the receiver, be made out and s. 372 sub-s. 1: "Where, in the "submitted to the receiver in "accordance with the next "in England, a receiver or "following section a statement "manager of the whole or "in the prescribed form as to the "substantially the whole of the "affairs of the company; and "property of the company (here- " (c) the receiver shall within two "after in this section and in "months after receipt of the said "the next following section "statement send—(i) to the "referred to as 'the receiver') "registrar of companies and to "is appointed on behalf of the "the court, a copy of the state- "holders of any debentures of "ment and of any comments "the company secured by a "he sees fit to make thereon "floating charge, then subject "and in the case of the registrar "to the provisions of this and "of companies also a summary "the next following section— "of the statement and of his " (a) the receiver shall forthwith "comments (if any) thereon; "send notice to the company "and (ii) to the company, a copy "of his appointment; and "of any such comments as afore- " (b) there shall, within fourteen "said or, if he does not see fit "days after receipt of the notice, "to make any comment, a notice "or such longer period as may "to that effect; and (iii) to any "be allowed by the court or by "trustees for the debenture

Act, 1948, and if so whether the first such abstract should be for the period of 12 months ended on March 1, 1949, or for some other and what period; and to ask that the time for sending in any such abstract as aforesaid might, if necessary, be extended for such period as to the court might seem meet.

J. G. Strangman for the debenture holders.

M. M. Wheeler for the trustees of the debenture trust deed.

Denys Buckley for the Board of Trade.

VAISEY J. This is a summons in a debenture holders' action which was commenced in the year 1937. The plaintiffs

"holders on whose behalf he
"was appointed and, so far as he
"is aware of their addresses, to
"all such debenture holders
"a copy of the said summary."

Sub-section 2: "The receiver
"shall within two months, or
"such longer period as the court
"may allow after the expiration
"of the period of twelve months
"from the date of his appointment
"and of every subsequent period
"of twelve months, and within
"two months or such longer
"period as the court may allow
"after he ceases to act as receiver
"or manager of the property
"of the company, send to the
"registrar of companies, to any
"trustees for the debenture
"holders of the company on whose
"behalf he was appointed, to
"the company and (so far as he
"is aware of their addresses) to
"all such debenture holders an
"abstract in the prescribed form
"showing his receipts and pay-
"ments during that period of
"twelve months or, where he
"ceases to act as aforesaid, during
"the period from the end of the
"period to which the last preceding
"abstract related up to the
"date of his so ceasing, and
"the aggregate amounts of his
"receipts and of his payments
"during all preceding periods
"since his appointment."

Sub-section 3: "Where the
"receiver is appointed under
"the powers contained in any
"instrument, this section shall
"have effect—(a) with the
"omission of the references to the
"court in subsection (1.); and
"(b) with the substitution for the
"references to the court in
"subsection (2.) of references to
"the Board of Trade; and *in*
"any other case references to the
"court shall be taken as referring
"to the court by which the
"receiver was appointed."

Sub-section 4: "... Nothing
"in this subsection shall be
"taken as limiting the meaning
"of the expression 'the receiver'
"where used in, or in relation to
"subsection (2.) of this section."

Sub-section 6: "Nothing in
"subsection (2.) of this section
"shall be taken to prejudice
"the duty of the receiver to
"render proper accounts of his
"receipts and payments to the
"persons to whom, and at the
"times at which, he may be
"required to do so apart from
"that subsection."

Sub-section 7: "If the receiver
"makes default in complying
"with the requirements of this
"section, he shall be liable to
"a fine not exceeding five pounds
"for every day during which
"the default continues."

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are the Industrial and General Trusts Ltd., suing on behalf of themselves and all other holders of the series of first mortgage debenture stock of Welsh Anthracite Collieries Ltd., to which I will refer as "the company." The defendants are, first, the company, and second, the Trustees Corporation Ltd., the latter being the trustees of the trust deed securing the said debenture stock, which was dated November 16, 1927. On March 2, 1937, judgment in the form usual in such an action was given and Sir William Henry Peat was appointed receiver and manager on behalf of the debenture stockholders. A direction was given to him to pass his accounts half-yearly, made up to September 1 and March 2 in each year. This direction has been duly carried out by him and the twenty-second of such accounts, covering a period of one year ending September 1, 1948, was duly certified on March 25, 1949, the delay in connexion with that account being sufficiently explained in the receiver's affidavit filed in support of this summons. Practically the whole of the assets of the company have been realized, only a few small items being left in the receiver's hands or under his control; the judgment has in fact been almost fully worked out, and the action itself is now practically at an end.

The Companies Act, 1948, to which I will refer as "the Act," came into operation on July 1, 1948. The question which I have now to decide arises under s. 372 of the Act which, for the first time, imposed certain duties on receivers and managers. The short question is whether, and if so to what extent, those duties fall to be discharged by receivers and managers appointed before the Act came into operation as well as by those appointed thereafter.

The section is divided into seven sub-sections. The marginal heading, which, of course, has no effect on its construction, is in these words: "Provisions as to information where receiver or manager appointed." The first of the seven sub-sections provides that "where, in the case of a company registered in England, a receiver or manager of the whole or substantially the whole of the property of the company (hereafter in this section and in the next following section referred to as 'the receiver') is appointed on behalf of the holders of any debentures of the company secured by a floating charge, then subject to the provisions of this section" . . . certain obligations are to arise. The definition section in the Act, s. 455, provides that "debenture"

includes debenture stock; and there is no doubt that Sir William Peat is receiver of the whole, or substantially the whole, of the property of this company.

Pausing there, it should be noted that the words "is appointed" differ in form from the words "has been appointed" in s. 370 of the Act, and there are in the Act other variations of expression in reference to the appointment of receivers to which I need not, I think, particularly refer.

The obligations which I have mentioned are shortly as follows: (a) the receiver is forthwith to notify the company of his appointment; (b) the company is within 14 days after the receipt of the notification to deliver a particular form of statement to the receiver; and (c) the receiver is within two months after receiving the statement to send documents to various authorities and persons.

So far as the first sub-section is concerned, it seems to me that it can only apply to the case of a receiver and manager appointed after the coming into operation of the Act, because the sequence of obligations begins with and depends on an act to be done forthwith, that is to say, at the inception of and as a first step in the receivership.

The difficulty arises under the second sub-section. [His Lordship read sub-s. 2 and then sub-s. 3 and continued:] Sub-s. 4 has no immediate bearing on the question which I have to decide, but there is a concluding sentence which I think I ought to read: "Nothing in this sub-section shall be taken as limiting the meaning of the expression 'the receiver' where used in, or in relation to, sub-s. 2 of this section."

Finally, sub-s. 7 provides that if the receiver makes default in complying with the requirements of s. 372, he shall be liable to a fine not exceeding 5*l.* for every day during which default continues.

Mr. Strangman for the plaintiffs asks me to say that sub-s. 2 applies only to post-Act receiverships, that is to say, receiverships which begin on or after July 1, 1948. He puts his argument in several ways. First, he says that as the application of sub-s. 1 of the section is admittedly so restricted, it is only reasonable to construe sub-s. 2 as similarly restricted. Secondly, he says that the expression "is appointed" differs in significance and not merely in words from "has been appointed," and that the expression "the receiver" at the beginning of sub-s. 2 is controlled by, and markedly

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controlled by, the definition of it in sub-s. 1, and means a receiver in the sense attributed to it on a proper construction of sub-s. 1, that is to say, a post-Act receiver. Thirdly, he says that the sub-section would, on the alternative view, have a retrospective effect because it would involve, in the case of the first so-called abstracts, a reference to transactions effected before the Act came into operation. Fourthly, he points out that the sub-section is a penal section and ought to be construed so as to impose no greater obligations than are indicated by its unmistakable terms.

In support of his arguments Mr. Strangman cited certain cases which I need not, I think, do more than mention in passing. The first of these cases is *Ex parte Todd* (1). The next is *Lauri v. Renad* (2), in which Lindley L.J., in the course of his judgment said: "It certainly requires very clear " and unmistakable language in a subsequent Act of Parliament " to revive or recreate an expired right. It is a fundamental " rule of English law that no statute shall be construed so " as to have a retrospective operation unless its language " is such as plainly to require such a construction; and the " same rule involves another and subordinate rule to the " effect that a statute is not to be construed so as to have " a greater retrospective operation than its language renders " necessary."

In the case of *In re School Board Election for the Parish of Pulborough* (3) there are some possibly relevant observations in the judgments of Lopes and Davey L.JJ. to the effect that where a statute imposes a new duty it must be presumed to be intended not to have a retrospective effect. The case is a curious one in some ways because the majority in the Court of Appeal, consisting of Lopes and Davey L.JJ.—Lord Esher M.R. dissenting—overruled the decision of the Queen's Bench Division (Lawrence and Wright JJ.), so that three judges were of one opinion and two judges, whose view prevailed, were of the other opinion. I have mentioned these cases as my attention was drawn to them, but I am very doubtful whether they are really relevant; because I do not think that, on any view of this matter, the section now in question of the Act can be said to have any real retrospective operation.

Mr. Wheeler for the trustees was content to support

(1) (1887) 19 Q. B. D. 186.

(3) [1894] 1 Q. B. 725.

(2) [1892] 3 Ch. 402, 420.

Mr. Strangman's argument, taking the view that in this particular case compliance with sub-s. 2 would serve no useful purpose whatsoever and would merely be a waste of money, time, and paper. With that view I am much inclined to sympathize. Indeed I was half, but only half, tempted to say that I would, on a certain view of this matter, be prepared to extend the two months' period to such a time, say, ten years, as would have the effect of excusing the receiver in this particular case from any obligation to do anything.

Mr. Buckley, for the Board of Trade, realizing (as I myself realize) that my decision must affect a very large number of cases, greatly assisted me by his argument to the contrary. He asks me to say that sub-s. 2 does apply to pre-Act receiverships, but only to this extent, namely, to oblige the receiver to carry out such of its directions as fall to be carried out by him at dates subsequent to the commencement of the Act. Thus in the present case, where the receiver was appointed on March 2, 1937, he should, according to this argument, compile his abstract for the year commencing on March 2, 1948, and send it to the appropriate quarter within two months from the end of that year, that is to say, on or before May 2, 1949. When I put to Mr. Buckley the possible case of the two months expiring immediately, or, say, two days after the Act came into operation, leaving the receiver no time to do anything, Mr. Buckley could only suggest that the receiver must, to avoid the risk of the penalty of 5*l.* a day, apply to the court for an extension of time, even if he had no funds out of which to pay the costs of the application. I do not think that such an exceptional case has very much bearing on the point or ought to be taken into more than passing consideration by me. However, Mr. Buckley admits that sub-s. 1 does not and cannot apply to pre-Act receiverships and that a pre-Act receiver is not obliged to do anything under sub-s. 2 unless the obligation to do it arises under the terms of the sub-section at a date subsequent to the coming into operation of the Act. He contends, and I am inclined to agree with him, that so to construe the sub-section would in no sense make it retrospective in its operation. He further says that the expression "is appointed" has in its context no other meaning than "shall be" or "shall have been" appointed, and that the limited effect of sub-s. 1 is attributable not so much to the

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form of that expression as to the nature of the obligations thereby imposed being such that their performance by a pre-Act receiver is, on the face of it, impossible.

It may be that the arguments are somewhat evenly balanced, but on the whole I prefer the view advanced by the plaintiffs. It seems to me that the whole of this section is a code for the guidance and the direction of post-Act receivers. It is noticeable that in s. 371, there is a sub-s. 4: "This section shall apply whether the receiver or manager was appointed before or after the commencement of this Act, and to periods before, as well as to periods after, the commencement of this Act." It is significant that there is no corresponding provision applicable to sub-s. 2 of s. 372.

Then I think that the definition which refers to "the receiver" in sub-s. 1 and the use of that expression at the beginning of sub-s. 2 point to the fact that this section is not legislating for receivers generally but only for receivers who come within the operation of sub-s. 1. The definition is, I think, rather curiously placed and curiously expressed. Sub-section 2 does not say "a receiver shall within two months" and so forth; it says "the receiver," and I think that, although one has in this case rather to grasp at straws in a somewhat choppy sea, that is an indication that the receiver on whom the obligations of sub-s. 2 are laid is necessarily the same kind of receiver as the receiver who is subject to the obligations of sub-s. 1.

It is regrettable perhaps that the section was not explicit on the point. As I have said, I think that there is a good deal to be said both ways, but I have formed my own view and I have expressed it.

I will, in answer to para. 1 of the summons, declare that Sir William Peat is not bound to carry out the procedure laid down in sub-s. 2 of s. 372. If the Board of Trade consider that the consequences of this decision are contrary to the public interest, they will, I hope, carry the matter to a higher court. If any leave is required for such an appeal, I will certainly grant it. My conclusion is, put quite briefly, that there is nothing in s. 372 which affects the position or increases the duties of a receiver who was appointed before July 1, 1948, and I am to some extent fortified in that conclusion by sub-s. 6 of s. 372, which says: "Nothing in sub-s. 2 of this section shall be taken to prejudice the duty of the receiver to render proper accounts of his receipts and payments

"to the persons to whom, and at the times at which, he may
"be required to do so apart from that sub-section."

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Declaration accordingly.

Solicitors: *Slaughter and May; Ashurst, Morris, Crisp
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Affirmed. C.A. [1950] 1 All E.R. 664.

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*Revenue—Estate duty—Will—Annuity payable to A and after his death
to B—Property passing on death—Duty now payable—Finance
Act, 1894 (57 & 58 Vict. c. 30), s. 1, s. 2 sub-s. 1 (b).*

A testator, who died in 1917, bequeathed to his trustees an annuity of 2,000*l.* payable during the joint lives of A and B and to be paid to A during A's life and after his death to B. A died in 1947 and a summons was taken out to determine whether estate duty was payable in accordance with the existing practice—i.e., under s. 1 of the Finance Act, 1894, on the value of a continuing annuity for the life of B—or whether it was open to the Commissioners of Inland Revenue to levy the duty under s. 2 sub-s. 1 (b), on the capital value of the proportion of the estate required to produce an annuity of 2,000*l.*, as upon the cesser of an interest.

Held, that, on the death of A, estate duty became payable under s. 1 of the Act, and only on the value of a continuing annuity for the life of B; and that, it having been made clear in *Earl Cowley v. Commissioners of Inland Revenue* [1899] A. C. 198, that ss. 1 and 2 were mutually exclusive, the determination that the property passed under s. 1 prevented the court from considering whether in regard to the same annuity an interest had ceased under s. 2.

In re Cassel [1927] 2 Ch. 275, followed.

ADJOURNED SUMMONS.

By cll. 3 and 5 of his will dated February 15, 1904, Henry, Duke of Norfolk (hereinafter called "the testator") devised and appointed his freehold hereditaments to his trustees for the term of 1,000 years and declared trusts thereof (inter

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alia) out of the rents and profits to pay any annuity bequeathed by him. By cl. 24 he declared that any annuity should be deemed to be bequeathed clear of all death duties payable in respect thereof and that such duties should be paid out of his residuary personal estate.

By cl. 3 of the first codicil, dated November 19, 1908, to his will the testator gave to his trustees an annuity of 3,000*l.* (subsequently reduced by a second codicil to 2,000*l.*) to commence from the day of his death and to continue payable during the joint lives of his brother Edmund Bernard, Viscount Fitzalan (hereinafter called "the late viscount") and his son, Henry Edmund Talbot (hereinafter called "the present viscount") and the life of the survivor of them and to be paid to the late viscount during his lifetime and, after his death, to the present viscount.

The testator died on February 11, 1917, and the late viscount died on May 18, 1947. At the date of the issue of this summons the Public Trustee was the sole trustee of the will.

The estate duty authorities, on the death of the late viscount, claimed estate duty under s. 2 sub-s. 1 (b), in respect of the benefit arising by the cesser of the annuity, and succession duty in respect of the succession of the present viscount to the annuity. The Public Trustee, however, contended that this was a reversal of the previous practice of the Estates Duty Office, which was, in cases of this sort, not to claim estate duty on the basis of "cesser" but on the basis that the annuity "passed," duty being assessed on the actuarial value of the annuity for the remaining lives or life and not on the capital or slice of capital required to produce the annuity.

This summons was taken out by the Public Trustee to determine whether estate duty became payable on the death of the late viscount (a) under s. 1 of the Finance Act, 1894 (1) and only on the value of a continuing annuity of 2,000*l.* for the life of the present viscount; or (b) under s. 2 sub-s. 1 (b)

(1) Finance Act, 1894, s. 1:	"passing on the death of the
"In the case of every person dying	"deceased shall be deemed to
"after the commencement of this	"include . . . (b) Property in
"part of this Act there shall . . .	"which the deceased or any
"be levied and paid, upon the	"other person had an interest
"principal value . . . of all	"ceasing on the death of the
"property . . . which passes	"deceased, to the extent to
"on the death of such person	"which a benefit accrues or
"a duty called 'estate duty'."	"arises by the cesser of such
S. 2, sub-s. 1: "Property	"interest."

of the said Act on the capital value of the proportion of the testator's estate required to produce an annuity of 2,000*l.* In the alternative, it sought to have determined to what extent and on what basis estate duty became payable on the death of the late viscount.

Russell K. C. and *H. A. Rose* for the Public Trustee. The existing practice is correct, but the Commissioners contend that it is not in accordance with the law and that the present case does not come under s. 1 but under s. 2 sub-s. 1 (b), of the statute and is a case of "cesser" of the interest of the late viscount. The annuity was, however, payable to the late viscount during his life and the annuity "passed," on his death, to the present viscount.

This summons is brought before the court to test the validity of that contention. There is a distinction between an annuity and a gift of an estate. They referred to *In re Palmer* (1); *In re Cassel* (2); *In re Northcliffe* (3); *In re Cassel's Will Trusts* (4); and *Earl Cowley v. Inland Revenue Commissioners* (5).

J. H. Stamp for the Commissioners of Inland Revenue. The Commissioners do not contend that the present practice is wrong, but that there is an alternative practice. The previous annuitant had precisely the same interest in the estate as his successor. The result in each case is identical. It is not sought to charge the annuity at all but to charge the corpus. In *Att.-Gen. v. Watson* (6) and *Skinner v. Att.-Gen.* (7) the annuities were charged on the general residue. The corpus producing the fruit and the fruit itself cannot both be charged. The annuity is part of the fruit, and when the corpus is taxed the fruit also is taxed. The language of the section is clear and no citation of authority is wanted, when it has once been admitted that the annuity is an interest in the estate. The annuity is plain at the death and there is no difficulty in applying s. 7 sub-s. 7 (b), in accordance with its quite clear terms.

Russell K. C. replied.

Cur. adv. vult.

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(3) [1929] 1 Ch. 327.

(4) [1947] Ch. 1.

(5) [1899] A. C. 198.

(6) [1917] 2 K. B. 427.

(7) [1940] A. C. 350.

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Oct. 19. WYNN-PARRY J., delivering a considered judgment said: By the first codicil to his will the late Duke of Norfolk (to whom I will refer as "the testator"), bequeathed to the trustees of his will an annuity of 3,000*l.*, reduced by his second codicil to 2,000*l.*, to commence from his death and to continue payable during the joint lives of his brother, the late Viscount Fitzalan and his son, the present Viscount Fitzalan and the life of the survivor of them. The testator died on February 11, 1917, and his brother, the late Viscount Fitzalan, to whom the annuity was payable during his life, died on May 18, 1947. The question raised by this summons is whether, on this death, estate duty is payable under s. 1 of the Finance Act, 1894 (to which I will refer as "the Act"), on the value of a continuing annuity of 2,000*l.* for the life of his son, the present Viscount Fitzalan, or under s. 2 sub-s. 1, of the Act on the capital value of the proportion of the testator's estate required to produce an annuity of 2,000*l.*

It is conceded on behalf of the Commissioners of Inland Revenue that on the true construction of the first codicil there is created only one continuing annuity: that that annuity is property within the meaning of s. 1 of the Act, which is settled: and therefore that estate duty could be claimed under that section on the basis which I have mentioned. But it is argued on behalf of the Commissioners that there is an alternative course open to them: that they need not levy the duty under s. 1, but may levy the duty under s. 2 sub-s. 1 (b) of the Act, as on the cesser of an interest.

There is a practice which has grown up, and which up to the present time has prevailed, in the Estate Duty Office in regard to joint or successive interests in a single annuity. This practice has been conveniently stated by Romer J. in *In re Cassel's Will Trusts* (1) in these words: "The practice
" may be illustrated in the following way: If an annuity
" of *XL*. a year is bequeathed to A for life, then to B for
" life, then to C for life, on the death of A (B and C
" surviving) estate duty is charged as on the passing of property
" (namely, a share of the annuity), and not as on the cesser
" of an interest. The same principle would be applied on
" the death of B, leaving C surviving, and estate duty would
" not be levied on a cesser of interest (that is to say, on a
" capital value basis) until the death of C. The same practice
" is adopted where joint beneficial interests are created in
" one annuity. Thus in a letter from the Estate Duty Office

(1) [1947] Ch. 1, 8.

" which is in evidence in the present case it is stated that, " as the official practice now stands, the interests of " Mrs. Joshua's two daughters, which arose on the death " of their mother, would be treated as being in one annuity." The learned judge adds this comment: " This practice " evidently did not prevail at the time of *In re Palmer* (1) for, " had it done so, duty would not have been charged on the " death of Ronald Palmer on a cesser of interest basis so far " as the 3,000*l.* annuity there under consideration was " concerned. It may have sprung up as a result of some " of the observations which fell from the Court of Appeal " in that case."

In this instance the Commissioners of Inland Revenue desire to depart from this practice and to be free to do so in any particular case in the future. The question is whether or not they are entitled to do so: or—to put it in another way—is the practice rightly to be regarded only as a practice from which accordingly they can depart, or is the so-called practice an accurate interpretation of the legal position, in which case there can be no right to depart from it? In these circumstances the case has, rightly I think, been described as a test case.

So far as this court is concerned the matter is, I think, concluded against the Commissioners of Inland Revenue by *In re Cassel* (2). In that case: " The testator bequeathed " ' Brook House and contents ' and the stables held therewith, " the leases of which would expire in 1995, to trustees upon " trust to allow Mrs. C. to have the use and enjoyment thereof " for life, and after her death upon the like trust for the " benefit of Lady L. for life. The testator directed: ' the " ' rent outgoings rates and taxes for the time being payable " ' in respect of the said messuage and premises and keeping " ' the same and the contents thereof insured against fire " ' and burglary and in a proper state of preservation shall " ' always be paid by my trustees out of the income of my " ' residuary personal estate.' Mrs. C., the first tenant for " life of Brook House, died on September 16, 1925, and was " succeeded as tenant for life by Lady L. The summons " asked how the estate duty, payable on Mrs. C.'s death " in respect of the benefit of the annual expenditure on " Brook House, should be borne as between Lady L. and the " testator's residuary estate, and how assessed."

(1) [1916] 2 Ch. 391.

(2) [1927] 2 Ch. 275.

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Russell J. expressed the view that, had he been unassisted or unimpeded by previous authority, he would have said that the case was only brought into charge under s. 1 of the Act by virtue of the provisions of s. 2. He said: "I should have thought that where a life interest in A ceased by A's death, with the result that an interest in B, which during A's life was reversionary became an interest in possession, no property passed on A's death. A's interest merely ceases, no part of it is transferred to B, or passes to B. I should have thought that such a case fell directly within the provisions of s. 2 sub-s. 1 (b), and only came within the charging s. 1 by virtue of s. 2." He then proceeded to state how, if that had been the correct view, the principal value would have been ascertained under s. 7 sub-s. 7, of the Act, observing that such a method would have been in accordance with the decision of the Court of Appeal in *In re Palmer* (1).

Russell J., however, was driven to the conclusion that he was prevented from holding that the case before him was not a s. 1 case but a s. 2 case by the decision of the House of Lords in *Earl Cowley v. Commissioners of Inland Revenue* (2). He then considered what was the property which passed on Mrs. Cassel's death and held that it was the benefit of the annual sum payable under the special clause. He says: "In substance, the trustees are bound for a period of time to apply an annual sum of varying amount for the benefit of the person for the time being entitled under the will to the enjoyment of Brook House and contents. What passes is the right to enjoy the benefit of that annual sum. That is the property which passed on the death of Mrs. Cassel." The learned judge then dealt with the question how the principal value of that property was to be ascertained under s. 7 sub-s. 5, as supplemented by sub-s. 8. He pointed out that the machinery provided by these sub-sections did not exactly fit the case before him, but observed: "Nevertheless the machinery must be made to fit, and I think it can be made to fit." He then stated the basis on which the principal value was to be ascertained.

In following and applying the decision of Russell J. in *In re Cassel* (3), I am not embarrassed by the decision of the Court of Appeal in *In re Palmer* (1) because, as is pointed out

(1) [1916] 2 Ch. 391.

(2) [1899] A. C. 198.

(3) [1927] 2 Ch. 275, 282.

by Russell J., the question between ss. 1 and 2 of the Act was not before the court. He says: "The Inland Revenue was not represented. The question was simply this—how, as between the persons interested in residue was the burden of the estate duty already paid as on a s. 2 case to be borne? The hands of the court were tied to that extent. The case had to be treated on the footing of s. 2 being the section to be considered, and not s. 1."

In the later case of *In re Northcliffe* (1), which concerned in substance aliquot shares in a residuary trust fund, Maugham J. described *In re Cassel* (2) as a very exceptional case. It is plain, however, from a consideration of his judgment that the respect in which Maugham J. regarded the case as being exceptional was the difficulty which arose, after Russell J. had been driven to hold that the case was a s. 1 case, in applying the machinery under s. 7, sub-ss. 5 and 8, by reason of the fluctuating nature of the annual sum involved. Again in the still later case of *Christie v. Lord Advocate* (3), Lord Russell of Killowen referred to his decision in *In re Cassel* (2) and made clear that the respect in which he regarded that case as being exceptional was as I have indicated. I cannot do better than quote his own words: "*In re Cassel* (2) was cited. That was indeed a very special case, in which, it having been decided that the *Cowley* case (4) compelled me to treat it as falling within s. 1 of the Act, it became apparent that no capital sum could be earmarked as producing either actually or notionally an annual sum which necessarily varied in amount within elastic limits. I indicated as best I could the lines upon which a valuation might be fairly reached. The case is certainly no authority justifying a departure from the principles laid down in the *Cowley* case (4) where, as here, a tenant for life of an aliquot share of settled property dies and is succeeded by others who immediately enter into the enjoyment of the income of the same share. In this connexion I would refer to the remarks of Maugham J. in the case of *In re Northcliffe* (1), which deal with the death of a tenant for life of an aliquot share of residue, and which appear to me relevant to a consideration of the present case." In the case of *Earl Cowley v. Commissioners of Inland Revenue* (4) it is made

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(2) [1927] 2 Ch. 275.

(3) [1936] A. C. 569.

(4) [1899] A. C. 198.

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plain that ss. 1 and 2 are mutually exclusive and that s. 2 is to be invoked only if s. 1 by itself cannot be invoked.

Mr. Stamp, for the Commissioners of Inland Revenue, contended that the principle emerging from *Earl Cowley v. Commissioners of Inland Revenue* (1) is only to be applied where each section operates on the same property, and relied on the circumstance that in that case the property consisted of an equity of redemption, whereas in the present case the property caught by s. 1 was the benefit of the continuing annuity, while the property fastened on by s. 2 was the whole of the testator's estate. I do not so read the opinions of their Lordships. In my judgment on the particular death in question, the question has first to be put, in regard to this annuity, does property pass? If it does, then cadit quæstio: the duty will be payable under s. 1. One is not entitled to go on and ask whether, in regard to this annuity, property could be deemed to pass under s. 2 as upon the cesser of an interest. The determination that property passes under s. 1 makes it needless to consider and prevents one from considering whether in regard to the same annuity an interest has ceased under s. 2.

In my judgment the argument advanced by Mr. Stamp was in effect considered and rejected by Russell J. in *In re Cassel* (2). The choice in that case was the same as that before the court in this case. As s. 1 applied, the property subject to duty was the benefit of the annual sum payable under the special clause, calculated by reference to the estimated market value thereof and the person liable for the duty was Lady Louis Mountbatten as the person entitled to the benefit of the special clause after the death of Mrs. Cassel. On the other hand, if s. 2 sub-s. 1 (b), had applied, wholly different considerations would have arisen: the calculation would have been made under s. 7 sub-s. 7, on what has been called the slice theory to ascertain the value of the benefit arising from the cesser of Mrs. Cassel's interest, and (subject to the question of interest) the estate duty would have been payable out of the residuary estate. Yet Russell J. felt no difficulty in applying the principle underlying *Earl Cowley v. Commissioners of Inland Revenue* (1).

For these reasons I am of opinion that so far as this court is concerned, the question is concluded by the decision of Russell J. in *In re Cassel* (2), and I therefore propose, in answer

(1) [1899] A. C. 198.

(2) [1927] 2 Ch. 275.

to question 1 of the summons, to declare that on the death of the late Viscount Fitzalan estate duty became payable under s. 1 of the Act, and only on the value of a continuing annuity for the life of his son, the present viscount.

Solicitors: *Nicholl, Manisty, Few & Co.*; Solicitor of *Inland Revenue*.

J. L. D.

Reversed. C.A. [1950] 1 All E.R. 436.

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Landlord and tenant—Agreement for tenancy for three years—Agreement by landlord to grant to tenants "a tenancy for a further term of three years at the same rent and containing the like agreements" and provisions as are herein contained, including the present "covenant for renewal"—Whether lease for 2,000 years constituted—Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), sch. XV., para. 5.

By an agreement made between the defendant as landlord and the plaintiff's predecessors in title as tenants, the defendant agreed to let certain premises for a term of three years, and the agreement contained a provision that "the landlord will on the written request of the tenants made three calendar months before the expiration of the term . . . grant to them a tenancy of the said premises for a further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained including the present covenant for renewal." The plaintiff took out a summons for the determination of the question whether this provision created a lease for 2,000 years by virtue of the Law of Property Act, 1922, sch. XV., para. 5.

Held, that the Act only operates where the lease is on the face of it perpetually renewable, and contains an express covenant for perpetual renewal; and, there being no such covenant in the agreement in suit, a lease for 2,000 years was not created.

Wynn v. Conway Corporation [1914] 2 Ch. 705; *Northchurch Estates Ltd. v. Daniels* [1947] Ch. 117; and *Green v. Palmer* [1944] Ch. 328, distinguished.

ADJOURNED SUMMONS.

By an agreement made on January 29, 1946, the defendant as landlord let to the predecessors in title of the plaintiff

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as tenants certain premises for a term of three years from January 30, 1946. The agreement contained the following clause: "The landlord hereby agrees with the tenants . . . that (he) will, on the written request of the tenants made three calendar months before the expiration of the term hereby granted, and if there shall not be at the time of such request any breach or non-observance of any of the agreements on the part of the tenant herein contained at the expense of the tenants grant to them a tenancy of the said premises for a further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained, including the present covenant for renewal." The plaintiff took out this summons to determine whether this clause created a lease for 2,000 years by virtue of the provisions of the Law of Property Act, 1922, sch. XV., para. 5 (1).

M. J. Albery for the plaintiff: As a matter of construction, the clause confers a right of perpetual renewal, and carries within it the seeds of its own reproduction. The cases are divisible into two classes: (a) where the obligation to renew is directly expressed in the original lease, and (b) where (as is the case here) there is a provision in terms for only one renewal, but a fresh covenant to renew in like terms must be included in the new lease. *Green v. Palmer* (2) is in the latter category, and decided that there was a right to renew only twice; but that case is distinguished on the facts and there were special circumstances—*e.g.*, it was a furnished letting. Alternatively it is submitted that it was wrongly decided: the ratio decidendi of it is difficult to understand.

In the old conveyancing practice before the Act the words "including" or "excluding this present covenant" were

(1) Law of Property Act, 1922, sch. XV., para. 5: "A grant, after the commencement of this Act, of a term, subterm, or other leasehold interest with a covenant or obligation for perpetual renewal, which would have been valid if this Part of this Act had not been passed, shall (subject to the express provisions of this Act) take effect as a demise for a term of two thousand years

"or in the case of a subdemise for a term less in duration by one day than the term out of which it is derived, to commence from the date fixed for the commencement of the term, subterm, or other interest, and in every case free from any obligation for renewal or for payment of any fines, fees, costs, or other money in respect of renewal."

(2) [1944] Ch. 328.

used to confer or exclude a perpetual right of renewal; see Bythewood and Jarman's Conveyancing, 4th ed. (1886) vol. III, pp. 217 and 591 note (t); Davidson's Precedents and Forms in Conveyancing, 2nd ed. (1864), vol. V, pp. 128 note (f) and 192; Davidson's Concise Precedents in Conveyancing, 20th ed. (1922), p. 234. The edition of Key and Elphinstone's Precedents in Conveyancing, current when this agreement was made (14th ed., 1940) shows in vol. I, at p. 949, a precedent with the words "other than this present covenant." This long course of practice derives authority from *Hare v. Burges* (1). Cases of the first category, where the right to renew is directly expressed, are *Wynn v. Conway Corporation* (2), and *Northchurch Estates Ltd. v. Daniels* (3). If it is suggested that the language of the lease in *Green v. Palmer* (4) is so similar that that case should be followed, regard should be had to the observations of Jessel M.R. in *Hack v. London Provident Building Society* (5) and *Aspden v. Seddon* (6), which show that in construing a document no other case is binding, even when the same words have been used.

This document should also be construed contra proferentem.

Hesketh for the defendant: The option granted in this case is similar to that in *Green v. Palmer* (4). The provisions of the Act do not apply when the right to renew perpetually is not expressed on the face of the document, as it was in *Northchurch Estates, Ltd. v. Daniels* (3). There must also be a distinction between covenants where the right to renew is unqualified, and where it is qualified by restraints against breaches.

HARMAN J. It is said that the plaintiff as assignee of the term of three years has got a term not of three years but of 2,000 years in the property. One may start with this: if that be the result in law, it was not contemplated by the parties when they made the original agreement, for it is clear that persons wishing to create a term of 2,000 years are very unlikely to do it by creating a term of three years with a right to renew. However that may be, the Law of Property Act, 1922, by sch. XV., para. 5, provides as follows: [His Lordship read the paragraph and continued:] It is said that this was

(1) (1857) 4 K. & J. 45.

(2) [1914] 2 Ch. 705.

(3) [1947] Ch. 117.

(4) [1944] Ch. 328.

(5) (1883) 23 Ch. D. 103, 111.

(6) (1875) L. R. 10 Ch. 394,
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a grant after 1925 of a term with a covenant for perpetual renewal and the question I have to determine is whether that is so.

The able argument of Mr. Albery was as follows. He said that these were the very words in which under the old system and under the law as it stood up to 1925 perpetually renewable leaseholds were in fact created. Therefore, on the very words of the section, this is such a covenant as would before the Act have created a perpetually renewable leasehold and the section operates accordingly.

In the first place I think one must pause and consider that this, on the face of it, is certainly not a covenant for perpetual renewal. You can have such a covenant in a lease and indeed it was not uncommon to find them in leases. An example which has been cited is contained in *Wynn v. Conway Corporation* (1), where there was a right to renew a 21-year term at the conclusion of the first 11 years and it was expressly provided that so often as every 11 years of the said term had expired "the lessors shall. . . grant unto the lessee a new lease of "the premises hereby demised . . . upon surrender of the "old lease as aforesaid and paying a fine of 7*l.* 10*s.* 0*d.* "on the day or time hereinbefore limited or appointed." There on the face of it—and the court could not and did not decide otherwise—there was a right to renew at the end of every eleven years and that was on the face of it a perpetually renewable lease.

A similar case since the coming into force of the Act is *Northchurch Estates Ltd. v. Daniels* (2), where the agreement was in these terms: "The term shall be for a period of one "year certain, the tenant having the option to renew the "tenancy from year to year on identical terms and conditions "by notice in writing to be given at or before Christmas in each year. Evershed J., as he then was, held that he had no option but to say that there was a perpetually renewable lease and therefore a term of 2,000 years was created in the property whether that was the result contemplated by the parties or not. Is that the same thing as the present case? Mr. Albery says yes, because there were two ways of creating a perpetually renewable lease. One was by inserting an express covenant on the face of the document and the other was by putting in a covenant in the form of the present agreement and, says Mr. Albery, where you find a covenant to

(1) [1914] 2 Ch. 705.

(2) [1947] Ch. 117.

renew for a further term and the grant of such further term is put in the same form, "including this present covenant "for renewal" (which are the words here used) that is the same thing as creating a perpetually renewable lease. He cited the case of *Hare v. Burges* (1), to support that proposition. That was a case of a demise for a year. According to the headnote, there was "A lease for lives, with a covenant "on the death of either of the cestuis que vie to execute "a renewed lease at the same rent and subject to the same "covenants, 'including this present covenant.' Held, a "covenant for perpetual renewal" on the footing that the lessee was entitled to have inserted in the renewed lease "a covenant for renewal totidem verbis with that contained "in the original lease."

Mr. Albery, in further support of that view, pointed out that in the old conveyancing precedents these words were used to create a perpetual right to renew and that a careful conveyancer if he wished to avoid trouble and did not wish to have it said that there might be such a perpetual right, would use the opposite words, namely "excluding this present "covenant." All that I accept; none the less, in my judgment, this part of the Act only operates to create a term of 2,000 years where the lease is on the face of it perpetually renewable. You have to find expressly in the lease or agreement a covenant or obligation for perpetual renewal. I do not find any such covenant here. All I find is a covenant for renewal once. It is true that it has in it, as Mr. Albery said, the seeds of its own reproduction; nevertheless, it is not on the face of it a covenant for perpetual renewal. Consequently, I hold that there is no term of 2,000 years created between these parties.

I ought to mention that there was also cited to me a decision of Uthwatt J., as he then was, of *Green v. Palmer* (2), where he held, without regard to this present point, that words in somewhat similar form as these created a right to renew twice and no more. That was an instance of a six monthly furnished tenancy and the improbability that the parties had thought of creating a 2,000 years term was very high. The learned judge stated that he was entitled to take into account and into consideration all the surrounding circumstances. How he came to the conclusion that he did I find difficult to follow, but I say no more about it because it does not

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seem to me that it touches the point which I have to decide here.

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That being so, I hold that on the true construction of the agreement it did not operate as a demise for a term of 2,000 years.

[The learned judge then proceeded to state that the parties had, by agreement, relieved him from having to resolve certain questions of difficulty regarding the assignability of the benefit of the covenant for renewal.]

Declaration accordingly.

Solicitors : *Evan Davies & Co. ; Neve, Beck & Co.*

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[1949 S. 3017]

Family provision—Procedure—Duties of executors—Distribution while proceedings under statute pending—Filing of evidence by executors—Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. 6, c. 45), ss. 1, 3.

An executor should make no distribution to beneficiaries while proceedings are pending under the Inheritance (Family Provision) Act, 1938, or while there is any possibility or expectation of such proceedings. The provision to be made for dependants under that statute may be directed to come out of any part of the estate, not necessarily out of residue.

Observations on the duties of executors with regard to the filing of evidence in proceedings under that statute.

ADJOURNED SUMMONS.

The testator, James Tudhope Simson, died on April 24, 1948, having by his will dated April 13, 1945, made specific bequests to his housekeeper, Mrs. Kathleen Beryl Burgess, of property to the value of approximately 6,000*l.* He bequeathed to his wife Lilly Louisa Simson, a legacy of 1,000*l.* and all moneys payable on his death under a policy of insurance ; to each of his two nephews, Graham Williams and James Alexander Simson Taylor, a legacy of 500*l.* ; and to his son, James Alexander Simson and his daughter Irene May Simson, the residue of his estate in equal shares.

The testator and his wife, whose marriage had taken place in 1910, entered into a deed of separation on February 18, 1929, under which (in the events which happened) she was to receive 200*l.* p.a. from the testator down to the date of his death. The value of the estate for the purposes of the Inheritance (Family Provision) Act, 1938, was approximately 14,000*l.* and the residuary estate was of the approximate value of 3,000*l.* The policy moneys amounted to 1,600*l.* The bequests were made free of duty.

A summons was taken out under the Inheritance (Family Provision) Act, 1938, by the testator's widow asking that such reasonable provision as the court might think fit might be made out of the estate for her maintenance.

W. F. Waite for the plaintiff.

M. Berkeley for the executor.

W. R. Rees-Davies for Mrs. Burgess.

T. A. C. Burgess for the children of the testator.

VAISEY J., delivering judgment, stated the question raised by the summons and the facts set out above and continued :

It will be observed that the available residue for division between the two children is not very much more than 3,000*l.*

The story is a familiar one. The testator and his wife separated, and there was in fact an agreement for separation which contains some elaborate provisions in regard to financial matters, but I think it will suffice for me to say that as a result of those provisions and in the events which have happened the widow, the plaintiff, was in receipt of 200*l.* a year from her husband down to the date of his death, which happened on April 24, 1948.

It has been suggested to me that the capital of which the widow has been placed in control under the will, amounting, as I have said, in value to some 2,600*l.*, has to be taken into consideration by me, not in any strictly arithmetical way, but as part of the circumstances which I have to consider, and with that I agree.

It has been also suggested to me by Mr. Waite that if that sum of money is considered to have an income value of some 78*l.* a year, taking the return at 3 per cent., his client ought in fairness to have that sum, namely, 78*l.* a year, made up to the 200*l.* which she has been receiving hitherto by granting her under the provisions of the Act an annual sum of 122*l.*

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I say at once that I think that is about the limit of what the widow ought to ask in the circumstances of this case. I do not overlook the fact that the 2,600*l.* might well be invested or made use of at a higher rate of interest than 3 per cent. I think possibly it might be invested at 4 per cent. and bring her in 104*l.* per annum.

The defendant, Mrs. Burgess, who, under the terms of the will, takes nearly half of this not very large estate, is a lady who had been the testator's housekeeper for many years before and down to the date of his death. She repudiates the idea that she was living with him in any sense which she might regard as offensive, and she says that she was his housekeeper and nothing else, and I deal with the situation on that footing.

I have, first of all, to decide what the plaintiff ought to have out of the estate by way of proper maintenance, but I have also to decide out of what part of the estate the provision should be made; because it is an illusion all too prevalent that these provisions are normally or primarily made out of residue. That is obviously a mistake. There may be cases, for instance, in which the testator has left a very large pecuniary legacy to a perfect stranger, and a small residue to members of his family to whom he has some moral obligation. It is obvious that if any provision, such as I am now asked to make, has to be made, it ought not in every case to come out of the residuary estate but may well be directed to fall on some particular portion of the estate. Indeed, I consider I have a free hand in the matter, because by s. 3 of the Act it is provided that where an order is made under the Act, then, for all purposes, the will shall have effect, and be deemed to have had effect, as from the testator's death as if it had been executed with such variations as may be specified in the order for the purpose of giving effect to the provisions for maintenance thereby made.

In the present case the defendant, Mrs. Burgess, who had no such moral claim on the testator as she might have if she had been living with him as his wife, receives benefits under the will amounting to rather more than 6,000*l.*, while the testator's own children, who are not in affluent circumstances, receive much less. [His Lordship described the circumstances of the children and continued:] I cannot regard the position as one in which those to whom the testator is under a paramount obligation, that is to say, his wife and children,

were in any way so situated that that paramount obligation could be or should be disregarded.

Mrs. Burgess no doubt served the testator very faithfully as housekeeper, though as nothing else. Although she was given board and lodging, so far as I can make out, by the testator, she received no salary from him, and it may be that these bequests to her are to some extent compensation for that in the nature of what I may call "back pay."

This case involves all sorts of considerations, including considerations of arithmetic, which I find very difficult to bring to a conclusion which is altogether satisfactory, but I am going to assume that the lady has within her power, from the legacies which were left to her by her husband, to provide for herself an income of 104*l.* a year, that is to say, 4 per cent. on 2,600*l.* That leaves 96*l.* to be made up, and that is the sum which I should propose to award to her.

The question is, from what source has that to come? In my judgment the proper allocation of that sum is that two-thirds of it, i.e., 64*l.* a year, should come out of the pecuniary legacies (that is those given to the nephews and to Mrs. Burgess) and the remaining 32*l.* should come out of the residue, making altogether the 96*l.*, which I think should be awarded to her.

The proportions in which the pecuniary legacies are given are, roughly, one-seventh, that is to say 1,000*l.*, to the nephews, and six-sevenths, that is to say 6,000*l.*, to Mrs. Burgess; and it seems to me that that 64*l.*, which I think should fall on the pecuniary legacies, ought to fall as to one-seventh on the nephews, and six-sevenths on Mrs. Burgess.

The order which I should make, but for a matter to which I am about to refer, is that the will should be read and construed to take effect from the testator's death as if there had been a preliminary bequest of an annuity during widowhood of, taking round figures, 55*l.* a year charged on and payable out of the income of the bequests given to Mrs. Burgess, and 9*l.* a year charged on the income of the bequests given to the nephews; and 32*l.* a year charged on the income of the benefits given to the two children by way of residue. Those three sums of 55*l.*, 9*l.* and 32*l.* add up to the 96*l.*, which I think is the proper allowance to be made to this lady.

But, unfortunately, a step was taken in this case which, in my judgment, was taken very inadvisedly. When the parties were before the master—I am now reading from the

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master's note—this happened : “ The plaintiff by her solicitor “concedes that she makes no claim against the nephew “legatees and is willing that they should be paid in full.” That may have been done, as I say, without due consideration of the consequences, but I think that, while the lady will take 55*l.* a year charged on Mrs. Burgess's interests, and 32*l.* a year charged on the children's interests, her disclaimer before the master has deprived her of, and she has given up any right to, the 9*l.*, which I think ought to be charged against the interest of the nephews. I have spoken to the master about this matter. He tells me that he never said that the legacies were to be paid, but that he took down from the lips of the plaintiff's solicitor the statement that she made no claim against the nephews and was willing that they should be paid in full. I think it would be quite in accordance with what would be right and proper that these nephews should be told that, but for that concession, which I think was ill-advised, I should have ordered them to pay out of the income of their legacies the sum of 9*l.* a year to this lady, i.e., 4*l.* 10*s.* a year each. I think that, if they are members of a family actuated by family good feeling and honour, these two men would feel that they were under some sort of obligation each to pay the sum of 4*l.* 10*s.* to this lady in each year to make up for what she has lost by the concession she made in telling the master that she made no claim against them. It seems to me that that must be the effect of this disclaimer because otherwise they would have been brought before the court or communicated with, or something of the kind. But I cannot see that she can go back on the statement which her solicitor made on her behalf that she was willing that they should be paid in full and that she made no claim against them.

I wish it to be made clear that in these cases it is the paramount duty of the executor to avoid embarrassing the court and to think once, twice and several times before allowing any part of all of the estate to be paid out to any beneficiary—whether a specific legatee or a residuary legatee, or whoever it may be matters not—while any application under this Act is either pending or impending.

If these legacies have been paid, as I understand they have, the matter comes before me in a form which adds further embarrassment to an already embarrassing jurisdiction. I wish it to be distinctly understood—I have said it before and I say it again, and I hope some notice will be taken of it—

that where an application under the Inheritance (Family Provision) Act, 1938, is either pending or impending, that is to say, during the first six months after grant of representation, if it is a case in which there is any risk of such a thing happening, the executor distributes the estate at his risk. If beneficiaries come and pester him and say that they want their legacies and pressure is put on other beneficiaries to allow these anticipatory payments to be made, in my judgment it is the duty of the executor to resist any such pressure. I think it must be said that where the court has to deal with a matter under this Act the estate should be there intact. Of course, duties and debts, and that sort of thing, can be paid—there is no question about that—but no distribution to beneficiaries should be made while there is any possibility or expectation that an application under this Act will be made.

The result is, I think, that the proper provision to be made for this lady would have been to give her 96*l.* a year, of which 55*l.* would be charged against Mrs. Burgess's interest, 9*l.* against the interests of the nephews, and 32*l.* against the interests of the residuary legatees. But the effect of what I have said is that the lady cannot claim the 9*l.*, and I shall not insert in the order anything about the 9*l.* I shall simply refer to the 55*l.* and the 32*l.*, and leave it at that. But I have already said that the nephews might very well in the circumstances make it up to this lady for her kindness in having asked that these two legacies should be paid at once, and not let her be out of pocket to the extent of the 4*l.* 10*s.* each in every year, which I should, but for what has happened, have awarded her at their expense.

Another thing I want to say is this. In this case the executors, the bank, the proper officials of the bank, have not filed any evidence at all, and I am told that the master said that he did not think any evidence was necessary, provided the executor would furnish the parties with all proper particulars on a piece of paper. That may be all right in very simple cases, but here, where there were several matters which wanted clearing up, it seems to me not a very convenient course. I will instance one such matter. Under the separation deed a provision was inserted as to events conditional on what particular policies were worth at the date of the separation deed, that is February 18, 1929. When I asked Mr. Berkeley, who appears for the executor bank, to tell me what the figure was, he could not tell me. In my judgment, in a case like

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this with obvious complications and doubts, and difficulties about that and other matters, it is the duty of executors to file an informative affidavit telling the court what is known to them, and what it is necessary for the court to know in order to deal properly with the matter. I think it is very unfortunate that with an estate of 14,000*l.* the parties should have been left to find out as best they could on slips of paper what the executor thought was the net value of the estate for the purposes of the Act. Although I do not want to lay down a definite rule that in every case the executor must always file an affidavit on these applications, I cannot help feeling that it should be the normal course for the executor to file an affidavit and to put the court in possession of the facts so far as known to him, or, in the case of a bank, so far as known to its officials. I regret that there is no affidavit in this case, and I think that it would have been much better if I had been fortified with that information which I have had rather to drag out bit by bit from the parties on some points on which they were not very clear themselves.

I will follow s. 3 and declare that the will shall be deemed to have effect as from the testator's death as if it had contained a bequest of a sum of 55*l.* p.a. payable to the plaintiff during widowhood out of the income of the legacies given to Mrs. Burgess, and a sum of 32*l.* p.a. during her widowhood out of the residuary estate given to the two children. The costs of all parties as between solicitor and client must be taxed and paid out of the estate.

I want to add this. It does not at all follow that all legatees must always be made defendants to these applications. It may well be that sometimes the court is given a little extra trouble, because when it looks into the matter it thinks there are legatees who perhaps are not fully aware of the risk they are running of having some part of the provision sought for thrown on them, and it may well be that the court will direct an adjournment and direct notice to be given to absent legatees, and possibly to direct other legatees to be joined as parties. I agree that sometimes it is difficult to know whether legatees should be made parties or not, but I cannot help observing from my experience in these applications that there is far too widespread an idea that the legacies are bound to be paid in full, and that provision of this kind will have to be made at the expense of residue. Of course, residue is the normal and obvious place from which provision is made, but there are a large number of

cases—and I think this is one—in which it is fairly plain that the children as residuary legatees of 3,000*l.* ought not to be asked to shoulder the whole of the burden when a lady, who is a perfect stranger to the estate and was not even the testator's unofficial wife, walks off with twice the amount which the testator's own children receive under the will. I should have thought it was fairly obvious,—indeed, it was quite obvious,—in her case that she would have to bear some part of the burden. But it seems to me also that the nephews were in exactly the same position as she was, and that she ought not to be asked to shoulder a larger burden than she would have been asked to shoulder if the nephews had been before the court. But for the action which the widow took before the master, I should have made the order which I cannot now make, and I should also have ordered the payment of 9*l.* p.a. out of the nephews' legacies giving them, however, an opportunity of appearing before me and arguing the matter, if they did not think they had been sufficiently protected by the other parties before the court. But having been paid, and having been released by the plaintiff in the plain words that the master noted at the time, which I have before me, I do not think I can do that now. I think the lady has lost 9*l.* p.a. and that she takes 96*l.* p.a. less 9*l.* p.a., which leaves her with 87*l.* p.a. in all.

Order accordingly.

Solicitors: *Field, Roscoe & Co., for Stockton, Sons & Fortescue, Banbury; Robinson & Bradley for Frank White & Williams, Ilford; Elborne & Garland.*

J. L. D.

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[1949 K. 44]

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Will—Bequest of share of residue to teaching hospital—Death of testatrix before coming into operation of Part II of the National Health Service Act, 1946—Probate granted subsequently—Destination of legacy—Construction of Act—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), s. 6, sub-s. 1; s. 7, sub-ss. 1, 10; s. 60, sub-s. 1.

A testatrix by her will dated June 18, 1948, appointed a sole executor and trustee and bequeathed one of eight equal shares of residue to a hospital designated as a teaching hospital and another such share to a research institution controlled by the hospital. She died on June 23, 1948. On July 5, 1948, Part II of the National Health Service Act, 1946, came into operation whereby the hospital was taken over by the State. Probate of the will was granted on July 31, 1948. On a summons taken out by the trustee of the will to have it determined how the legacy consisting of the two shares was to be dealt with, Harman J. held ([1949] Ch. 509) that none of the three sections, ss. 6, 7 and 60, applied and that the legacy should be administered by the Crown under the Sign Manual. On appeal:

Held, (1.) that neither s. 6 nor s. 7 applied, but (2.) (reversing Harman J. on this point) that s. 60, sub-s. 1, was applicable with the result that the trustee of the will was bound to apply the shares of residue in paying the capital and income to the Board of Governors for the teaching hospital constituted by the Act.

APPEAL from Harman J. (1).

By her will dated June 18, 1948, the testatrix, Mrs. Mabel Alicia Kellner, appointed the plaintiff to be her sole executor and trustee and bequeathed the residue of her estate to the plaintiff upon the administration trusts expressed in Form 8 of the Statutory Will Forms, 1925, and she directed him to divide the nett proceeds of realization into eight shares and pay one such share to the Royal Cancer Hospital (Free) and another share to the Cancer Research Institute. The Royal Cancer Hospital (Free) had been incorporated by royal charter in the year 1910 and in addition to its hospital the corporate body owned and controlled the Cancer Research Institute,

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which was conducted under its own directors and staff. The testatrix died on June 23, 1948. On July 3, 1948, Part II of the National Health Service Act, 1946, (1) came into operation whereby the hospital, which was designated by the Minister to be a teaching hospital, and the institute came under the

(1) National Health Service Act, 1946, s. 6, sub-s. 1: "Subject to the provisions of this Act there shall, on the appointed day, be transferred to and vest in the Minister . . . all interests in or attaching to premises forming part of a voluntary hospital . . . being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing . . . or otherwise carrying on the business of the hospital . . . but not including any endowments within the meaning of the next following section or any rights and liabilities transferred under that section."

Section 7, sub-s. 1: "Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister . . . as a teaching hospital . . . all endowments of the hospital held immediately before the appointed day shall on that day . . . be transferred to and vest in the Board of Governors constituted under . . . this Act for the teaching hospital."

Sub-section 10: "In this

section the expression 'endowment,' in relation to a voluntary hospital, means property held by the governing body of the hospital, or by trustees solely for the purpose of that hospital, being property of the following descriptions Provided that an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests shall not be deemed to be an endowment of that hospital."

Section 60, sub-s. 1: "Where property, other than property transferred to the Minister or to the Board of Governors of a teaching hospital . . . under s. 6, or s. 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorize or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorizing or . . . requiring the trustees to apply the trust property . . . for the purpose of making payments whether of capital or of income (a) in the case of a hospital designated as a teaching hospital . . . to the Board of Governors of that teaching hospital."

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control of a Board of Governors constituted under the Act and were taken over by the State. Probate of the will was granted to the plaintiff on July 31, 1948.

The plaintiff took out a summons asking whether the legacy consisting of the two shares, (1.) vested in the Minister of Health under s. 6 of the Act or in the Board of Governors under s. 7; (2.) should be applied by the trustee to the purposes of the hospital under s. 60; (3.) should devolve as on an intestacy; or (4.) should be administered under some other and what trust.

Harman J. held: (1.) that having regard to the proviso to s. 7, sub-s. 10, the interest in the share of the testatrix's estate was not an endowment within the meaning of s. 7, sub-s. 1, and did not vest thereunder in the Board of Governors; (2.) that the benefit of a right to a share in an unadministered estate was not a right within the meaning of s. 6, sub-s. 1, and did not vest thereunder in the Minister of Health; (3.) that the word "property" as used in s. 60, sub-s. 1, did not include rights and therefore that the plaintiff could not be required to apply the share of trust property to the purposes of the Board of Governors; and (4.) that the legacy did not lapse and it should be administered by the Crown under the Sign Manual.

The Board of Governors of the hospital appealed.

Ungoed-Thomas K.C. and *H. E. Francis* for the appellants, the Board of Governors of the Royal Cancer Hospital (Free). The real question is whether the learned judge was right in holding by implication in his judgment that the hospital had ceased to exist as a charity. That point was not argued below. It is contended that the appellants take these shares of residue either as "endowments" under s. 7 of the National Health Service Act, 1946, or as property held on trust immediately before the appointed day and the terms of the trust instrument require the trustees "to apply" the trust property for the purposes of a teaching hospital within s. 60. The word "apply" embraces "pay." The judge was influenced by the fact that s. 60 is in a different part of the Act from ss. 6 and 7, and he regarded that section as merely a receipt clause. But s. 60 was inserted in the Act to catch any property which had not been caught by s. 6 or s. 7. The Board of Governors can give a receipt on behalf of the hospital under s. 59 of the Act. The rights of the beneficiaries where an

estate has not been administered are explained in *Attorney-General v. Lord Sudeley* (1) ; *Lord Sudeley v. Attorney-General* (2) and *Skinner v. Attorney-General* (3). It is submitted first that the interest of the hospital is an endowment within s. 7. It is clear that if the administration of the testatrix' estate had been completed before the appointed day s. 7 would have applied. The difficulty lies in the definition of " endowment " in sub-s. 10 of that section. The trustees held one-eighth of the residuary trust fund upon trust for the hospital. There were no other equitable interests in that particular eighth share, and it is consequently not within the proviso to sub-s. 10. Clause 5 of the will treats the estate as invested. This was a gift of investments within s. 7, sub-s. 10 (a). The language of s. 6 is not apt to cover this interest. Secondly, if it is held that the effect of the proviso to sub-s. 10 of s. 7 is to exclude this interest from being classed as an endowment, it is caught by s. 60. It would defeat the scheme of the Act to construe s. 60 narrowly. That section covers everything not within s. 6 or s. 7. Lastly it is submitted that the hospital which was incorporated by Royal Charter has not ceased to exist. Section 77 shows that such a hospital is treated as a continuing institution : see also the definition of hospital in s. 79, sub-s. 1. The regulation under the Act designating this hospital as a teaching hospital leaves its corporate character unaffected. The corporate body still exists. All that the Act has done is to change the governing body : *In re Lucas* (4).

H. E. Francis in the same interest. It is submitted that s. 60 covers this case. Harman J. attached undue importance to the fact that s. 60 is in a fasciculus of sections headed " administrative provisions." The section applies to cases where a hospital has a limited or defeasible interest. If this gift is not caught by any provisions of the Act, it is submitted that the appellants are entitled to it under the general law. The charity has not ceased to exist, because the charity consists of the charitable work of relieving sickness, and not of the administrative body by which that work is carried on. The court will direct payment of a charitable legacy to the body which is for the time being administering the charity : *In re Donald* (5). The Board of Governors are therefore the proper body to give a receipt. The fact that a new

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governing body has been substituted for the old governing body does not affect the right of the hospital to receive the gift.

M. Berkeley for the Minister of Health. It is appreciated that the wording of s. 6 is not apt to cover this gift. The Minister's general interest is in promoting the Health Service and he wishes to support the appellants.

Denys Buckley (with him *Sir Frank Soskice S.-G.*) for the Attorney-General. It is clear that neither s. 6 nor s. 7 applies. In order that s. 60 of the Act should apply four conditions are necessary which cannot be satisfied: (1.) there must be identifiable property; (2.) the property must be held on trust; (3.) the trusts must be constituted by a trust instrument; and (4.) the trusts must be of a kind indicated by the section, that is, trusts authorizing or requiring the trustees to apply the trust property for the purpose of making payments, whether of capital or income, to the Board of Governors. Even if (1.) must be answered in the affirmative by treating the identifiable property as the estate of the testatrix, how can (2.) be satisfied while the property is vested in the executor for administration? It is not until administration is completed and the residue vested in the trustee that the property can be said to be held on trust.

[VAISEY J. Surely the property is held in trust by the executor?]

But even so (3.) is not satisfied for the trusts are not constituted by the will until administration is completed. The only way that could be accomplished is (as has been suggested) by reading the Administration of Estates Act, 1925, together with the will and by treating them together as a trust instrument. If that was a right view it would extinguish my argument but there have been numerous cases where it has been held that an executor is not a trustee. Can he be said to be a trustee in the sense that he is required to carry out the trusts? It is submitted not. The trust property must (for the purposes of s. 60) be held at the relevant date upon the trusts and the duty of distributing residue is not an executorial duty.

[SOMERVELL L.J. The proviso to s. 7, sub-s. 10, excludes from being an endowment within the section an equitable interest held for the purposes of a hospital in trust property in which there are other equitable interests. That exception is dealt with by s. 60.]

It is submitted that s. 60 is not intended to be an omnibus section sweeping up every property in which a hospital had an interest not covered by ss. 6 or 7. The gift here must be construed as a gift to the Royal Cancer Hospital and if, as submitted, the gift does not pass under the Act, it must be administered *cy prés*.

[SOMERVELL L.J. Nothing has been done to put an end to the Board of Governors of the hospital that was created a corporation by the Royal Charter.]

It is not sought to say that the chartered body has ceased to exist but that it is no longer carrying on charitable purposes. The whole scheme of the Act was to transfer property to a new body incorporated under the Acts ; and if, as is submitted, none of the relevant sections is applicable for this purpose the gift to the hospital must be applied *cy prés*.

Sir Frank Soskice S.-G. following on the same side. Under s. 60 there must be trusts authorizing the trustees to "apply" the trust property for the purpose of making payments, whether of capital or income, to the Board of Governors. Can the word "apply" in the context be accepted as covering a direct payment over of the share of residue ?

[VAISEY J. In the usual maintenance clause, applying for the benefit of a beneficiary is taken not to include an out and out gift.]

If the draftsman of s. 60 had intended to cover out and out payment he could have used far more appropriate language.

[VAISEY J. The words "authorize or require the trustees" . . . to apply" in the section make possible a different construction that tells against the argument that immediate payments of capital are not permitted.]

That does create a difficulty. The words "trust instrument" surely mean a document inter partes and cannot be taken to refer to an Act of Parliament as has been suggested.

J. A. Armstrong for the plaintiff.

EVERSHED M.R. (after stating the facts): The question that has arisen in the action is in regard to the effect of the National Health Service Act, 1946, upon the testamentary dispositions. That Act was passed on November 6, 1946, some eighteen months or more before this testatrix made her will, but nothing, as it has turned out, depends on that fact. The appointed day—that is for present purposes the day on which the Act came into operation—was July 5, 1948: a

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date, be it observed, after the death of the testatrix but before the probate of her will. The parties to the present proceedings when the matter was before the learned judge, were (apart from the plaintiff executor-trustee) first, the Board of Governors of the Royal Cancer Hospital—that, as I shall explain presently, is a body corporate, the creation of the National Health Service Act, 1946—second, the Ministry of Health, third, Mrs. Norah Cox, who was joined as representing the testatrix's next of kin, and, fourth and last, His Majesty's Attorney-General representing the general interests of charity. In this court Mrs. Cox does not appear. Her claim to participate as next of kin was negatived by the learned judge. She has not given any notice of appeal and the matter proceeds accordingly in her absence.

The real question, put briefly and I hope sufficiently accurately, is whether the terms of the Act of 1946 specifically provide for the destination of Mrs. Kellner's bounty to the Royal Cancer Hospital (Free) and, if they do not, how the property given to that charity should now be disposed of. The learned judge took the view that the Act failed to comprehend this particular gift but came to a conclusion in favour of the argument of the Attorney-General that there was here a charitable intention to which effect could and should be given by directing the administration of the bequest under the Sign Manual. I think it is important at the outset to observe that, in my judgment, the body corporate designated by the testatrix the Royal Cancer Hospital (Free) has not—or at least has not been proved to have—ceased to exist. I mention that matter at once because unfortunately the point does not appear to have been debated in the court below: the learned judge concluded that the corporation had ceased to exist and his general conclusion on the terms of the Act was, and was naturally, affected by that view. But, as I have indicated, I think that the corporation must be taken still to exist. Indeed no one in this court has suggested the contrary. The exhibits in the case include a copy of the charter which was granted in the year 1910 and incorporated the charity which had existed ever since the year 1851. It would, I think, be surprising if by some chance phrase in an Act of this kind a corporation incorporated by Royal Charter was wholly dissolved. Such a view is indeed, I think, inconsistent, if I may anticipate the reference I shall make to the Act presently, with the terms of s. 77 of the Act itself.

The charter provides that the President and Governors for the time being shall be a corporation with perpetual succession, and the purposes of the charter also indicate that the management of the affairs of the hospital will be in the hands of a committee of management. I think the distinction between the corporation on the one hand and its committee of management on the other hand may be of importance when I come to deal with the terms of the Act itself; but I emphasize at the outset of my judgment that, in my view, this corporation has not been dissolved. As I have said, that difference in conclusion in regard to the existence of the old corporation may well underlie the difference in the result at which I arrive from that which commended itself to the learned judge.

I must now turn to the relevant sections of the Act; and I am happy to say that, for myself, I have not found a perusal of these sections so melancholy an experience as did the learned judge, nor do I arrive at so negative and depressing a conclusion. Nor do I think, for myself, that the legislators, and more particularly the draftsmen, deserve the very severe strictures which the learned judge directed against them in his consideration of the terms of this statute. The first section, taking them in numerical order, to which it is necessary to refer, is s. 6. That was the section which directed the transfer to the Minister of Health of, among other things, the hospitals, in the sense of the physical things, the buildings and their equipment and of what one might describe as the going concerns of those institutions. The terms so far as relevant of sub-s. 1 of s. 6 are these: [His Lordship read the sub-section.] Assuming for the moment that the rights arising under the will in the present case are not excluded as being an "endowment" within the meaning of the next following section, are they covered by the language of s. 6? I am content to take as part of my judgment the statement of Harman J. (1), of what were the rights of the hospital, or of those representing or claiming to represent the hospital—I am deliberately using inconclusive terms. "The rights," he said, "of the residuary legatees are rights to have the "estate of the testatrix administered according to law, either "by the personal representatives or by the court, and on "completion of the administration to have the balance "remaining in the executors' hands distributed in due

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"proportions." Are those rights covered by the section? Are they, in particular, covered by the words "rights to which any such governing body were entitled immediately before the appointed day, being rights acquired solely for the purposes of managing" the hospital? The learned judge concluded that as a matter of plain English those words were not apt to cover such a right as was conferred by the present benefaction, and I entirely agree with him.

I think the matter is not one on which it is possible or useful to dilate and I therefore pass to the next question, whether those rights which I defined by reference to the learned judge's judgment are covered by the terms of s. 7, which deals with endowments as forecast by sub-s. 1 of s. 6. To make the matter more clear, I should state that we are here dealing with a teaching hospital. Under an order made pursuant to the Act on April 7, 1948, by the Minister of Health and known as the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, this hospital, the Royal Cancer Hospital, was designated a teaching hospital. Section 7 deals specifically, among other matters, with the "endowments" of teaching hospitals, and their destination differs from the destination of "endowments" of other voluntary hospitals: but for the purpose of this judgment I think it is unnecessary to go through the whole matter and to explain how in the case of the different kinds of hospitals what are described as endowments are dealt with.

[His Lordship then read s. 7, sub-s. 1, and continued:] I will in due course deal with the constitution of the Board of Governors there referred to, being the first defendants in this action; but first to complete my analysis of s. 7 I turn to sub-s. 10, which sets out what is meant by "endowment." I preface it by recalling that under the later definition section, s. 79, the word "property" unless the context otherwise requires includes "rights." Sub-section 10 is in this form: "In this section the expression 'endowment,' in relation to "a voluntary hospital, means property held by the governing "body of the hospital or by trustees solely for the purposes "of that hospital, being"—not "including" but "being"— "property of the following descriptions—(a) interests in or "attaching to land other than the premises referred to in "sub-section (1.)"—which I have already read—" (b) shares, "stocks, bonds, debentures and other securities, and any

“other personal property held by way of an investment; “(c) money, including any credit in a banking account; “(d) rights under any bill of exchange, promissory note or “gratuitous covenant for the payment of money.” There is a proviso the reading of which I will for the moment postpone. It is I think plain that the four types of property specified show that the word “endowment” is used in a sense much wider and less precise than the sense in which that word is commonly used, meaning something which is treated as a capital asset not itself to be spent but the income of which is to be applied from time to time for the purposes for which the endowment was given. “Endowment” here is wider than that, but is it wide enough to include rights of the type here dealt with? There is no evidence that there is any land involved in this case, but I am not satisfied that even if there were it would be possible to bring in the rights here in question under (a) for the reason that, assuming the assets of the testatrix included land, the beneficiaries under the will would have no rights to or in that specific asset. The argument in favour of the application of s. 7 has really turned on (b), and particularly on the words “any “other personal property”—and I insert “including rights”—“held by way of an investment.” Again I share entirely the view of the learned judge that that phrase, as a matter of plain English, does not cover rights of this kind, and that to speak of rights of this kind as being “held by way of an “investment” is to abuse the ordinary sense of the words which have been used. But even if it could be said that the rights given by this will were brought within one or other of the paragraphs I have read or would otherwise be brought within any of those paragraphs, I also agree with Harman J. that they would be excluded by the terms of the proviso to sub-s. 10 which is as follows: “Provided that an equitable “interest held for the purposes of a voluntary hospital in “trust property in which there are other equitable interests “shall not be deemed to be an endowment of that hospital.” It is not, perhaps, on the view I have taken, necessary to decide the point, but it seems to me that the rights which the hospital (or those representing it) have are fairly covered by the phrase “equitable interest held for the purposes” of the hospital “in trust property,” namely, the testatrix’s assets, “in which “other equitable interests also subsist,” namely, the interests of the other individual legatees. The result, therefore, so far,

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is that I share the view which Harman J. expressed, that neither s. 6 nor s. 7 covers this case. The conclusion as regards s. 6 defeats the claim of the Ministry of Health, and Mr. Berkeley, representing the Ministry, has said that since he has served no cross notice it would not really in any case be open to him to argue the contrary. At any rate, I take it that the Minister is satisfied with the result as regards s. 6.

It was, I think, at this point that the gloom descended most heavily upon the learned judge. I think he was oppressed by his feeling that since *ex concessis* the old chartered corporation had gone, the result was to leave at this stage entirely in the air, so to speak, the bequest under the terms of the will. But before coming to the solution of the remaining problem (*i.e.*, Is the bequest affected by other and later sections of the Act?) it is necessary that I should mention those sections of the Act which establish the existing Board of Governors and that I should also refer to the later sections which deal with the position of the incorporated or voluntary hospitals and the Committees or Boards of Management of those old hospitals after the change which this Act introduces. I can deal with these matters quite briefly. Section II and sch. III to the Act provide in this case—and, as I say, I think it is not necessary to deal at length with the whole matter—for the establishment of a Board of Governors for each of the designated teaching hospitals. As a matter of fact, we were told that the individuals who compose the Board of Governors, who are some twenty persons, are largely but not exclusively the same persons as formerly managed the old corporation. That, however, is a matter of interest rather than of relevance. The new body is by the terms of the schedule made a corporation sole and its name is the Board of Governors of the Royal Cancer Hospital, that is the first defendants. The Board of Governors of the Royal Cancer Hospital is an entity quite different and distinct from either the Royal Cancer Hospital (Free), the old chartered corporation, or the governing body of that corporation, namely, the old Committee of Management. I pass to s. 77—I am going out of order but it is convenient to deal with the matter in this way—which provides: “Where at the passing of this Act there is in force,” among other things, a “charter containing provisions appearing “to the Minister either to be inconsistent with any of the “provisions of this Act or to be redundant . . . the Minister

"may by order" repeal, amend or alter the charter. There is then a sub-section to the effect that any provision of a charter which defines or limits the objects of a hospital to which s. 6 applies (and this is such a hospital) would cease to have effect in so far as that limiting provision would be inconsistent with the objects defined for the hospital by the Act. I refer to s. 77 because, as I have intimated earlier, the presence of such a section would *prima facie* be inconsistent with the view that any pre-existing chartered corporation automatically disappeared and was dissolved altogether as the result of the passing of this Act and the transfer under s. 6 or other sections of the Act of the assets and property of the old corporation to someone else. It appears that the Minister has not yet in fact made any order amending or repealing the terms either of this charter or, as far as we know, other charters, and I will assume that there are good reasons for that not having been done so far. I must then make reference to s. 78 because there is one part of this section which the learned judge particularly relied on in support of his view that the old corporation had gone. It says this: "The following bodies, that is to say . . . (c) governing bodies of voluntary hospitals transferred to the Minister by virtue of this Act whose functions wholly cease in consequence of this Act shall as from the appointed day be dissolved." The governing body is defined in s. 79 as meaning in relation to a voluntary hospital "any body, whether corporate or unincorporate, having the control and management of the hospital," etc. The learned judge I think read that section as if it had in effect said: "The chartered corporation, being now *functus officio*, has gone." I think it may well be that the old Committee of Management (who I am disposed to think are covered by the definition of "governing body"), since they are *functi officio*, have been dissolved; but in my judgment there is nothing in s. 78, sub-s. 1, coupled with the definition paragraph, which (at any rate on the evidence in this case) has the effect that the old chartered corporation has been dissolved and has disappeared. That has this result, that if property by bequest or otherwise is given to the corporation, however that property should now be administered, it still remains in the corporation unless there is something in the Act which takes it away from the corporation and transfers it to somebody else. If either s. 6 or s. 7 had applied, you would have had that result; the

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property would have been taken away from the hands of the old corporation and put into the new hands designated by the relevant section. And I pause here to note that where those sections do apply, it is also provided in the sections that in the new hands the property transferred is free from the old trusts; but at the same time provision is made to the effect, putting it quite broadly, that so far as conditions allow the property will be administered consistently with, or so as not to disregard more than the circumstances require, the old trusts which affected it.

Therefore, in approaching the final point and the only point upon which I venture to disagree with the learned judge the position is, as I have stated, that *prima facie* the property or rights being given to the corporation remain in the corporation. The result, if that is right, has led in the course of the argument to alternative suggestions. Either the property or the rights belonging in this way to the old corporation remain in the old corporation but are dealt with or disposed of by virtue of s. 59; or s. 60 comes into play and has the effect of transferring from the corporation to the newly created Board of Governors the "rights" which Mrs. Kellner left to the hospital. Of those two alternatives I conclude in favour of the latter, and it is unnecessary for me to say anything upon the former. I think that s. 60 does fit the case and, I would add, fits it aptly. [His Lordship read s. 60, sub-s. 1, and continued:] I add that there is a sub-section—sub-s. 2—which makes s. 60 in this respect parallel, so to speak, with the earlier sections: "Any sums "paid as aforesaid to any such Board"—that is a Board of Governors—"shall, so far as practicable, be applied by them "for the purposes specified in the trust instrument." Before I deal with the argument which Mr. Buckley put forward in favour of the view that s. 60 does not apply, it is I think proper to say this: s. 60 occurs in Part VI of the Act, a part beginning with s. 52 and headed "General." The fasciculus of sections containing s. 60 may, I think, be treated as beginning at s. 57 where there is a cross-heading: "Administrative provisions." It was the view of the learned judge that this section, if it applied at all, must be applied by a kind of side wind since, when one has regard to the place in the Act where it is found, and to the well-known doctrine that a thing should be recognized by its associates, it is not in its place the sort of section which one could treat as properly

intended to cover this kind of case. On that ground the learned judge referred to the attempt of Mr. Ungeod-Thomas to seize this section to his comfort as being a last resource—a tabula in naufragio. With all respect, I do not accept that criticism. I think it might perhaps have been of assistance to those charged with the administration of this Act if in the earlier part of the Act dealing with the transfer of property there had been some reference to or forecast of the later general sweeping up provision (giving powers to the Boards and trustees and so on) of which this section is part. But it does not seem to me an inappropriate place in the last part of the Act called “General” to find provisions of a general character which operate, and I think were intended to operate, to bring in, among other things, classes of property not dealt with by the specific provisions as to transfer in the earlier part of the Act. However that may be, on its language I hold that s. 60 does cover, and covers precisely, this case.

Mr. Buckley has said that the language used postulates four tests for the application of this section. I agree: but I think the tests are satisfied. First, according to Mr. Buckley, there must be identifiable property. Well, I think there was; I think the property was the estate of Mrs. Kellner. Second, he says, that property must be held on trust immediately before the appointed day. Though there was at one time some hint of an argument that the fact that probate had not been taken out until after the appointed day might make a difference, that suggestion has not been pursued, and it seems to me true to say that the estate of Mrs. Kellner was held on trusts which were operative immediately before the appointed day. The matter is not one which requires elaborate argument, but if that property was not held on operative trusts at that date, how was it held? I think the posing of that question provides the necessary answer. It was held not as anybody’s absolute property but on trust in the sense that someone was bound to apply those assets in the due course of administration and, subject to the statutory obligations thereby imposed, to apply the residue in accordance with Mrs. Kellner’s testamentary dispositions. Thirdly, says Mr. Buckley, the trust must be constituted by a trust instrument. As regards that, if it is meant that the whole of the trusts, that is the whole of the duties affecting this property, must necessarily be found in a single trust instrument as commonly understood, i.e., a will or a settlement, I do not

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think that is a requisite of the section. If the trusts which affected this property at the relevant date were partly the statutory duties imposed by the Administration of Estates Act, 1925, and partly the trusts imposed by the will, the latter were comprehended by the former, and the former were in fact expressly introduced into the latter and, it may be that the Administration of Estates Act, 1925, can itself properly be regarded as a trust instrument. Certainly there is nothing which according to ordinary principles would necessitate there being but one trust instrument. But it is, I think, sufficient to say that there were at the relevant date trusts affecting this property and that such trusts are to be found in part at least in the testatrix's will. Finally, says Mr. Buckley, the trusts must be of a kind indicated by the sub-section, that is (referring again to the language) the trust instrument must "authorize or require the trustees, whether "immediately or in the future, to apply any part of the "capital or income of the trust property for the purposes "of any hospital." There was some discussion in which we were assisted by the Solicitor-General as to the meaning of that phrase "apply any part of the capital or income "for the purposes of any hospital." It was pointed out by Vaisey J. during that discussion that were it not for the words "authorized or required" it might be said that the phrase "apply for the purposes of" was not apt to cover the case of direct payment ; but since there is here a reference both to "authorizing" and also to the imperative "requiring" it seems to me that the phrase is quite naturally apt to cover applications in the sense of payment direct to the hospital or to the hands which receive on the hospital's behalf, as persons absolutely entitled. It seems to me, therefore, that the sub-section when it is analysed covers both aptly and precisely this case.

If that be so, that is, of course, the end of the matter. The learned judge when he dealt with this part of the argument said (1) : "The context of this section requires that the word " 'property' should not here include rights, for that which is "dealt with is something to be applied for the benefit of (among "others) a board of governors. The rights vested in the board "of governors here cannot be applied by someone else for their "benefit." With all respect, I venture to think that the learned judge misdirected himself by regarding the property

(1) [1949] Ch. 516.

held on trust as being the rights vested in the beneficiaries under the will instead of looking at the assets vested in the executor on trust for the hospital and other beneficiaries. It may be, as I have said more than once, that he was led to this approach by his consideration that the old chartered corporation had gone so that the only persons who could have any "rights" would be the new Board of Governors. Once that assumption is made I am inclined to agree that the application of the section becomes more complex and artificial. But it seems to me that one must regard the "property held on trust" as being the assets in the hands of the executor subject to the trusts statutory or testamentary on behalf of, among others, the existing chartered corporation. I therefore have formed a different view from that entertained by the learned judge on this section for the reasons which I have tried to express and I think that s. 60 does apply. The result is that we must now construe the section not as requiring Mr. Blundell after completion of his administration to apply or pay an appropriate share of the trust property over to the old chartered corporation but as requiring him to apply the trust property to the same extent, that is to say, to the extent of an equivalent share, to the Board of Governors of the teaching hospital now known as the Royal Cancer Hospital. If that is so, it follows, in my judgment, that the appeal is entitled to succeed and that Mr. Ungood-Thomas is entitled to the declaration which he seeks, that the property, that is the relevant share of the residuary estate, is now payable to the Board of Governors of the Royal Cancer Hospital.

SOMERVELL L.J. I agree, and there is very little I wish to add. I do not wish to add anything to what has been said about the inapplicability of ss. 6 and 7. With regard to the learned judge's observations based on the fact that s. 60 occurs in Part VI, I would like to say that, if one looks, as I have been looking, at the headings of all the other Parts of the Act and then asks oneself this question: "Assuming there "is some provision to cover a case of this kind on the basis that it is not an endowment under s. 7 or property transferred to the Minister under s. 6, where would one expect to find it?"—then I should think, having regard to the structure of the Act, that there is only one answer and that is "In Part VI." Therefore, that part of the learned judge's reasoning does

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not affect my construction of this section. Nor do I follow when he says: "The expression 'the trust property' means "the residue of the estate and the question is whether the "terms of the trust instrument," that is the will, "require "the trustee (that is the plaintiff) to apply a part of the "capital for the purposes of the Cancer Hospital. In my "judgment this language is wholly inappropriate, and the "section has nothing to do with the case." That is a very concise statement, but I do not myself follow it or agree with it. On the examination to which this section has been subjected by the Master of the Rolls I find no difficulty in coming to the conclusion that the section does cover this case. What the position would have been if it did not it is unnecessary to consider. I agree with what has been said as to the old corporation remaining in existence. There might have been a question of some difficulty as to what was to happen when the charity named in the will was having its functions or a substantial part of them carried on by another body. But it is unnecessary to consider that case. I think that this case clearly falls under s. 60 and for those reasons I agree that the appeal should be allowed.

VAISEY J. I am of the same opinion. I agree that s. 60 of the Act is not inaptly placed in the sequence of sections and does in fact cover the present case on a proper interpretation of its terms. Whether it was the primary intention of the legislature that it should have that effect may, I think, be doubted. There are, in my judgment, other types of case to which s. 60 applies, if I may so put it, quite obviously and indisputably. Its application to the present case is only to be discovered by a microscopic examination of its terms, though I am myself entirely satisfied that the result of that examination is as indicated by my Lord. I am to this extent, but only to this extent, in agreement with the criticisms directed by Harman J. against the draftsmanship of the Act, that I think the point might without any great difficulty have been dealt with in somewhat less cryptic language.

Appeal allowed.

Solicitors: *Farrer & Co.*; Solicitor, Ministry of Health;
 Treasury Solicitor; *Blundell, Baker & Co.*

H. C. G.

In re GROSVENOR METAL CO. LD.

[No. 00913 of 1948.]

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Company—Winding up—Judgment creditor—Execution—Postponement—Rights of creditors—Discretion of court—Costs—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 325, sub-s. 1 (c).

Section 325, sub-s. 1 (c), of the Companies Act, 1948 (which authorizes the court to set aside certain rights of a liquidator in favour of a creditor who has failed to complete execution before the commencement of the winding-up of a company) has enlarged the discretion of the court by empowering it to do what is right and fair according to the circumstances of each case, and supersedes the previous jurisdiction, under which nothing short of a trick or some actual dishonesty justified interference by the court.

Armorduct Manufacturing Co. Ltd. v. General Incandescent Co. Ltd. [1911] 2 K. B. 143, considered.

ADJOURNED SUMMONS.

By s. 325, sub-s. 1 of the Companies Act, 1948, it is provided :
“ Where a creditor has issued execution against the goods
“ or lands of a company . . . and the company is subse-
“ quently wound up, he shall not be entitled to retain the
“ benefit of the execution . . . against the liquidator in
“ the winding-up of the company unless he has completed
“ the execution . . . before the commencement of the
“ winding-up. . . . Provided that (c) the rights conferred
“ by this sub-section on the liquidator may be set aside by the
“ court in favour of the creditor to such extent and subject
“ to such terms as the court may think fit.”

Bebb Industries Ltd., a judgment creditor of Grosvenor Metal Co. Ltd., having issued but failed to complete execution before the date on which the latter company went into liquidation, took out a summons for an order that, pursuant to s. 325, sub-s. 1 (c) of the Companies Act, 1948, the amount of their judgment debt, together with interest thereon, be raised out of the proceeds of sale of the effects of the Grosvenor Metal Co. Ltd. and paid to the applicant company.

David Weitzman for the plaintiff company.

M. Gravenor Hewins for the liquidator of Grosvenor Metal Co. Ltd.

VAISEY J., delivering judgment, read s. 325, sub-s. 1 (c) of the Act, and continued : The case which I am deciding today

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raises no general question of principle, and the only matter about which I think I ought to say a word is whether head (c) of the proviso has made any alteration in the existing law. Mr. Weitzman has referred me to certain authorities, of which I need only mention *Armorduct Manufacturing Company Ltd. v. General Incandescent Company Ltd* (1), in which it was held by the Court of Appeal that, where the postponement of execution had been caused by a trick on the part of the defendant company, the plaintiffs ought not to be prevented from proceeding with their execution. That was a decision under the old section, of which the operative part was substantially identical with the present section, save that it did not contain the exception stated under head (c) of the present proviso. The effect of the decision in the case to which I have just referred made it clear that in the case of a trick, or something equivalent to dishonesty, the court had power to act, although there was no express statutory provision enabling it to do so.

That case of *Armorduct Manufacturing Company Ltd. v. General Incandescent Company Ltd.* (1) has always been regarded hitherto as the high-water mark of this jurisdiction, and I think that before the passing of the Companies Act, 1948, nothing short of a trick, or some actual dishonesty, would justify interference by the court. It is suggested that this new head (c) of the proviso does no more than declare the law as it existed before the passing of the Act of 1948, and that I ought to proceed on the footing, as I should have proceeded before the Act of 1948 came into operation, that in view of the decision in *Armorduct Manufacturing Company Ltd. v. General Incandescent Company Ltd.* (1), nothing short of trickery would justify my interference. But when I look at the words of head (c) of the proviso it appears to me that I am given a wider jurisdiction, because it enables me to defeat the rights conferred on the liquidator either wholly or partially, because of the words "to such extent." It enables me also to impose terms—for instance, I think I could say that the execution creditor should have the benefit of 50 per cent. of the judgment, or that he should have the benefit of the judgment subject to any terms I might think fit to impose. Therefore I hold that under this proviso I have a wider discretion than I should have had before that proviso became part of the law.

I am not going through the facts of this case. I do not think

(1) [1911] 2 K. B. 143.

anybody could say there was any trickery here; but I do think—and I hold as a fact—that the applicants, *Bebb Industries Ltd.*, were persuaded or induced or requested to stay their hands in the matter of this execution. While I acquit the officers of Grosvenor Metal Company Ltd. of any kind of dishonesty, or impropriety, I think that, but for their requests and but for the pressure they put upon the applicants, this execution would have been completed before the commencement of the winding-up. I think that in this case the rights of the liquidator must be set aside in favour of the applicants, and I so decide.

The only question which has given me any real anxiety is what I should do about the costs. Of course, the liquidator could not possibly accede to this claim without a decision of the court; on the other hand, I do not see why the applicants should not have their costs. I think the proper course is for me to make the declaration asked for, and to direct the liquidator to pay the costs of the applicants.

In conclusion, I wish to repeat that I do not think the facts of this case are likely to be at all relevant in any other case. The section seems to give the court a free hand to do what is right and fair according to the circumstances of each case. It is just because the discretion is so wide and so uncontrolled, and because the words are so lacking in any sort of guidance, that the exercise of it is made so difficult. All I can say is that I have come to the conclusion that in this case the applicants, in all the circumstances, should succeed.

Application granted.

Solicitors: *Gilbert, Clarke & Gilbert; Linklaters & Paines.*

J. L. D.

WHITESIDE v. WHITESIDE AND OTHERS

[1948 W. 175.]

Rectification—Deed of covenant—Payment to be “free of income tax”—Mistake of law—Supplemental deed remedying position of covenantee—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), General Rules, r. 23, sub-r. 2.

On April 16, 1942, the plaintiff executed a deed in favour of his former wife, after the marriage had been dissolved and with a view to providing her with maintenance, whereby he covenanted

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to pay her "the sum of 1,000*l.* per annum free of British income tax up to but not exceeding 7*s.* 6*d.*" These words had been substituted by the plaintiff's solicitor for the words "such a sum" after deduction of income tax at the rate of not more than "7*s.* 6*d.* in the *l.* as shall represent 1,000*l.* per annum," originally inserted in the draft as prepared by the wife's solicitor. The plaintiff's intention was that his former wife should receive a net payment of 1,000*l.* after income tax up to the stated rate had been deducted. At first the Commissioners of Inland Revenue allowed a deduction from the plaintiff's surtax on the footing that he was legally liable to pay on that basis but after two years they refused to allow the deduction and the plaintiff then commenced an action for rectification of the deed by substituting the words "such an annual sum as after deduction of British income tax at the rate of 7*s.* 6*d.* in the *l.* will leave 1,000*l.*" for those in the deed set out above.

While this action was pending, the plaintiff executed on March 30, 1948, a supplemental deed which incorporated the proposed rectification so as to make him legally bound to pay the wife the full amount of 1,000*l.* as from the date of execution of the supplemental deed, as in fact he had previously done.

Held by the Court of Appeal, that the court could not exercise the equitable jurisdiction to rectify seeing that: (1.) the plaintiff was seeking to obtain a rectification that would restore the deed to the state in which it would have been but for the error of the plaintiff by his solicitor; (2.) that the question of tax was never present to the mind of the plaintiff's former wife so that rectification was being asked for when owing to the execution of the supplemental deed there was no issue between the parties.

Burroughes v. Abbott [1922] 1 Ch. 86, and *Jervis v. Howle and Talke Colliery Co.* [1937] Ch. 67, distinguished.

Decision of Harman J. [1949] Ch. 448, affirmed.

APPEAL from Harman J. (1).

The plaintiff and the first defendant were married in 1919 but the marriage was dissolved on October 4, 1940. Before the hearing of the divorce proceedings the parties and their solicitors had discussed alimony and maintenance of the wife and children but had not reached agreement when the decree was made absolute. Negotiations were continued and in a letter of February 4, 1941, the solicitors acting for the wife set out the terms with which she would be satisfied: "In substance, the proposals you made are accepted, but we set out the terms according to our instructions in the following way . . . (3). Payment to Mrs. Whiteside of 1,000*l.* per annum free of tax up to the rate of tax in the *l.* payable as at the date of the deed of covenant to

(1) [1949] Ch. 448.

"be entered into between the parties for the permanent maintenance of Mrs. Whiteside and her two children, and this during her lifetime . . . (6). The terms when agreed to be wholly incorporated in a deed of covenant the provisions thereof to be secured both as to maintenance and otherwise by deposit of a sufficient block of shares." These terms were not accepted and the plaintiff wrote to his solicitors on February 11, 1941, saying: "My offer of 1,000*l.* annuity, free of tax up to 7*s.* 6*d.* in the *£* stands. I am not interested in their suggestion, free of tax up to the rate [prevailing] at the date of the covenant." After this there was an interview between the solicitors acting for the parties and, so far as they had authority to do so, they agreed that the wife should receive annually "1,000*l.* clear of tax up to 7*s.* 6*d.*" This agreement was subject to confirmation by the wife who was then resident in Canada. She confirmed the agreement and her solicitor proceeded to draw the deed of covenant contemplated between the parties. The draft recited: "It has been agreed between the parties hereto that the husband and his personal representatives shall pay to the wife during her life for the maintenance of herself and the said children such a sum as after deduction of tax at the rate of not more than 7*s.* 6*d.* in the *£* shall amount to 1,000*l.* per annum." In cl. 1 (1.) of the operative part of the draft, the husband was expressed to covenant in these terms: "During the life of the wife pay to the wife such a sum after deduction of income tax at the rate of not more than 7*s.* 6*d.* in the *£* as shall represent 1,000*l.* per annum payable in advance." The plaintiff's solicitor amended the recital in the draft deed to read so far as the sum payable for maintenance was concerned: "The sum of 1,000*l.* per annum free of British income tax up to but not exceeding 7*s.* 6*d.* in the *£* payable in advance"; and the operative clause to read: "During the life of the wife . . . to pay to the wife for her maintenance the sum of 1,000*l.* per annum free of British income tax up to but not exceeding 7*s.* 6*d.* in the *£* payable in advance." The plaintiff's solicitor stated in evidence that he made those alterations because this was a divorce matter and he thought that the deed should follow the usual wording of orders in the Divorce Court. The amendments were accepted by the wife's solicitor under the impression, as he said, that he had not altered the rights of his client. The deed was executed in that form on April 16, 1942, both sides

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believing that it provided for a net payment of 1,000*l.* after deduction of income tax up to the stated rate.

Pursuant to the deed, the plaintiff paid to his former wife a net sum of 1,000*l.* each year, and for the first two years the payment was admitted by the Commissioner of Inland Revenue as a legal liability in reduction of his surtax. The present action was commenced by the plaintiff against the wife and the trustees of the deed after the Commissioner of Inland Revenue had refused to allow the deduction of the payment because it contravened r. 23, sub-r. 2 of the general rules made under the Income Tax Act, 1918 (1). The plaintiff claimed rectification of the deed so as to make the clause relating to payment to the wife read, in fixing the amount of the payment: "Such an annual sum as after deduction "of British income tax at the rate of 7*s.* 6*d.* in the £ will "leave 1,000*l.*"

While the action was pending the plaintiff continued to pay the full amount to his former wife and on March 30, 1948, he executed a supplemental deed by which he agreed that the deed of April 16, 1942, should be treated as rectified and as having always read in the terms in which rectification was being asked for.

Harman J. held that the court could not exercise its jurisdiction to rectify merely to enable the plaintiff to obtain a deduction for the purposes of his liability to tax.

The plaintiff appealed.

J. A. Wolfe and C. G. Honeyman for the plaintiff. Rectification ought to be allowed to remedy a mistake due to the plaintiff's solicitor who thought he ought to insert such words in regard to payment to the former wife as corresponded to those which the Divorce Court normally employed in making maintenance orders. It is true that so far as the wife is concerned, the effect of the mistake has been put right by the considerate act of the husband, but this ought not to prevent him from obtaining rectification to make the original deed of covenant read as was always intended. Harman J.

(1) By r. 23 of the General Rules applicable to scheds. A., B., C., D. and E. of the Income Tax Act, 1918: (1.) "A person "who refuses to allow a deduction "of tax authorized by this Act "to be made out of any payment, "shall forfeit the sum of fifty "pounds"; (2.) "Every agree- "ment for payment of interest, "rent or other annual payment "in full without allowing any "such deduction shall be void."

in refusing rectification had been influenced by what Evershed J. (as he then was) said in *Van der Linde v. Van der Linde* (1) and said that the action was not brought to put right anything that needed to be put right. This is not so. The parties entered into the deed of covenant with a common intention. The bargain it was intended to give effect to in law was not accomplished, and that is a ground for rectification. The document put forward by the wife's solicitor would have given the plaintiff all he wanted and that is sufficient evidence of a common intention.

[EVERSHED M.R. : Here the wife was not in the least concerned with taxation. She only wanted a clear 1,000*l.* a year which the supplemental deed has given her. The only effect of rectification would be to give the plaintiff a benefit.]

There was a mutual intention to which the original deed did not give effect. The fact that the plaintiff has behaved like a gentleman and given the wife all she wanted by the supplemental deed should not deprive him of his right to rectification. The fact that he has come to the court with clean hands is a good reason for giving him the equitable relief he is asking for. If he had not executed the supplemental deed, the wife could without doubt have obtained rectification, giving both her and the plaintiff the relief he is now claiming. Authorities that lend support to this claim are *Burroughes v. Abbott* (2) and *Jervis v. Howle and Talke Colliery Co.* (3). The latter case strongly resembles the present one as both parties then signed the agreement between them in the belief that it gave effect to their intention. *Fredensen v. Rothschild* (4) was relied on by Harman J., though it is not very near the present case.

[EVERSHED M.R. : Do you say that the statement in Kerr on Fraud and Mistake 6th Ed. 620, relied on by Harman J. is wrong ?]

Yes. It goes too far. In *Van der Linde v. Van der Linde* (5) there was no trace of mutual intention or common mistake.

[EVERSHED M.R. : If you were right, a man could obtain rectification of something in a deed injurious to him, although it had nothing to do with the other party to the deed.]

It would have affected the other party here but for the husband's action in signing the supplemental deed. That action should not impair his position.

(1) [1947] Ch. 306, 310, 311.

(2) [1922] 1 Ch. 86.

(3) [1937] Ch. 67.

(4) [1941] 1 All E. R. 430.

(5) [1947] Ch. 306.

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[COHEN L.J. referred to *Guaranty Trust Co. of New York v. Hannay & Co.* (1).]

The equity it is sought here to enforce may be stated as follows : Where a document is executed which does not carry out the intention of the parties, each party has the right against the other to have the document reformed in such manner that the document will place both parties in the position that they intended. [They also referred to *Jackson v. Stopford* (2).

The first defendant did not appear.

Colinvaux for the trustee of the deeds.

EVERSHED M.R. : This is an appeal from a judgment of Harman J., in which he expressed his reasons for refusing to make an order at the suit of the plaintiff for rectification of a deed of covenant entered into by the plaintiff and his former wife (who was one of the defendants) on April 16, 1942. I will say at once that in my judgment the learned judge was right in refusing the order. The deed in question arose out of the fact that the marriage of the plaintiff and the first defendant had been dissolved, and the deed was executed in order to make provision for the claim that the wife had against her former husband for maintenance. The trouble has been caused by a misapprehension—a misapprehension which has figured in more than one case which has come before the courts—as to the effect in a deed of a promise to pay a sum of money “free of income tax” ; for it is beyond doubt that in a deed or contract between the parties such a form of obligation contravenes the provisions of the income tax rules and disentitles the covenantee to receive the named sum free of obligation in respect of tax, imposing upon the covenantor the duty of deducting from the sum promised the appropriate tax. This case is curious in that when the deed was first drafted the form of the obligation assumed the language legally appropriate to achieve what no doubt the parties intended. It said : “ During the life of the wife pay to the “ wife such a sum after deduction of income tax at the rate “ of not more than 7s. 6d. in the £ as shall represent 1,000l. “ per annum.” According to the evidence, shortly before the deed was executed the plaintiff, by his solicitor—I use that phrase because it has been suggested that the plaintiff

(1) [1915] 2 K. B. 536.

(2) [1923] 2 I. R. 1.

can deny the solicitor's authority—altered the draft. For present purposes it seems to me that the case is exactly the same as though the plaintiff had, by his own hand, altered the draft. However, altered it was, and it took this form: "To pay to the wife the sum of 1,000*l.* per annum " free of British income tax up to but not exceeding 7*s.* 6*d.* " in the *£*."

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As I have said, the result in law was that the right of the wife was limited to receiving 1,000*l.* less income tax on that figure, and not a gross sum free of tax; and it was the right and indeed in strictness the duty, of the husband to make that deduction. But for some time the error passed unnoticed, and the husband, who it is right to say behaved towards his wife with perfect propriety and in the most honourable way, paid to his wife the full sum which it was intended by him that she should receive namely—and I will leave out the complication caused by the limitation of the amount of the tax—the net figure of 1,000*l.* a year. I gather that for a time he was allowed by the Revenue Authorities to deduct from his own taxable income for surtax purposes a sum on the basis that the obligation was to pay not 1,000*l.* less tax, but such gross figure as, after deduction of tax, would leave 1,000*l.* In due course the error came to light, and the writ in the present action was issued on January 21, 1948. The husband claimed against his former wife and the trustees of the deed to have it rectified by restoring in the deed the language of the draft. From the start the husband paid to his wife the sum of income he intended her to receive, and which she had intended and indeed bargained and stipulated to get. After the date of the writ, but before the matter came on for hearing, the parties, being not at issue on this point, proceeded to execute a supplemental deed rectifying the error, so that as between themselves the deed then took the form and was thereafter to be treated as having always taken the form that the obligation was to pay such a sum as, after deduction of tax, would leave 1,000*l.* per annum.

The fact of there having been that rectification *inter partes* is, to my mind, the vital element in this case. The learned judge based his refusal to exercise this discretionary remedy of rectification (which, as has been said, must be cautiously watched and jealously exercised) on more than one ground. One of them was based upon observations of my own in an

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earlier case of *Van der Linde v. Van der Linde* (1). I will say in a moment something further about that case, but the particular passage which the learned judge cited and relied upon is to be found in the report of the case (2). I am reported as saying, in reference to the argument then put forward on behalf of the Crown: "Where on the facts it is shown that "there never was any obstacle as between the two parties "to the deed to put right any mistake, it would not be a case "in which on any view the court should exercise its discretion "more particularly where the object is on the plaintiff's part "to obtain, so to speak, by a side wind an advantage which "he could have obtained and which he only lost through the "error which was made." I do not find it necessary, after hearing the argument, to qualify in any way that formulation of the point: but it was, of course, merely a statement of the argument and was unnecessary for my decision in that case. And I do not think that in the present case it is necessary to pursue that aspect of the matter further, or to express a decided view one way or the other whether that proposition be well-founded. I would, however, say as to the case of *Van der Linde v. Van der Linde* (1), that I agree with the learned judge in thinking that the headnote to the case does not very accurately state what the point was. That was a case in which a man, who had covenanted voluntarily to make a payment to his sister, sought rectification by inserting provisions which would enable him to better his position vis-à-vis the revenue. The ground of the decision was failure on the part of the plaintiff to prove as a fact that he ever intended that the document which he executed should take any particular form with regard to the resulting tax position.

As I have referred to that case I will also now mention two other decisions to which Harman J. referred. The first was the decision of P. O. Lawrence J. in *Burroughes v. Abbott* (3). That was a case of an order made by the Divorce Court which, though expressed to be that the husband should pay x pounds per annum free of tax, was held to mean and intend that by whatever form the order was implemented the obligation should be to pay such a sum as, after deduction of tax, would leave x pounds. In that case, the deed followed the strict terms of the order of the Divorce Court, and the result was that the wife was only entitled to the smaller sum: the action arose because in the circumstances the husband,

(1) [1947] Ch. 306.

(3) [1922] 1 Ch. 86.

(2) Ibid. 311.

or those who represented him, stood on the strict legal obligation and the wife therefore sued for rectification so that the true position, as the Divorce Court had ordered it, should be reflected accurately by the instrument prepared by conveyancing counsel which, it was held, failed adequately to reflect it. So there was—and this was, I think, the essence of the matter and distinguishes the present case from it—a substantial issue between the parties. And the question was: Would the court in the exercise of its equitable powers call upon or order the defendant husband to give effect to what the Divorce Court had said he should do? The learned judge held that, although the trouble had arisen from a misapprehension common to both parties of the effect of conveyancing counsel's document, nevertheless there was a ground for exercising the equitable remedy vested in the court. I do not see that there is any ground for suggesting that the decision in *Burroughes v. Abbott* (1) cannot stand with the view which I have already indicated is the right view in this case, *i.e.*, that no order for rectification ought to be made. In the later case of *Jervis v. Howle and Talke Colliery Co.* (2), which came before Clauson J. (as he then was), the question was not dissimilar save that it arose not between a husband and wife or a former husband and wife, but between the parties to a mining lease. It was proved that the contract which the two persons (whom the learned judge described as not being men of wide business experience or culture) entered into was a bargain that one should pay to the other a royalty expressed in this form: "3*d.* per ton on all coal to be paid free of tax"; and the learned judge found as a fact that the intention of the parties when they so bargained was that the 3*d.* per ton should be the net sum. Again, the error was made of drafting the mining lease in a form which adhered strictly to the language above stated, so that the obligation of the mining lessee entitled and bound him in paying his 3*d.* to deduct income tax from it. Again the matter came before the court because the defendant company, which assumed the rights and obligations of the original lessee, claimed that it was entitled to make that deduction, whereas the lessor said that if the agreement as executed had that effect it failed to implement the bargain. There was, therefore, a substantial issue between the parties, and the learned judge, following the principle of *Burroughes v. Abbott* (1) held that there was again room and

(1) [1922] 1 Ch. 86.

(2) [1937] Ch. 67.

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occasion for the exercise by the court of its equitable jurisdiction to reform. In the course of his judgment Clauson J. referred to the well-known remarks of Lord Thurlow L.-C. in *Shelburne v. Inchiquin* (1), and indicated that the fact that the mistake arose from the legal result of the language used was not a bar to the relief claimed.

The learned judge in the present case, I think, thought that that decision was inconsistent with the conclusion at which he felt constrained to arrive. With all respect to him, I do not think it is, and I therefore, for my part, do not associate myself with the criticism that the learned judge directed to *Jervis v. Howle and Talke Colliery Co.* (2), or find it necessary to express any doubt of the correctness of Clauson J.'s decision. In the course of his judgment, Harman J. further referred to the statement in *Kerr on Fraud and Mistake* 6th Ed. 620 and cited it as a correct statement of the law. The passage is this: "Though the court will rectify an instrument which fails through some mistake of the draftsman in point of law to carry out the real agreement between the parties, it is not sufficient in order to create an equity for rectification that there has been a mistake as to the legal construction or the legal consequences of an instrument." I do not read that passage as meaning that if the mistake made is in using language to perfect an agreement which in law has some result different from the common intention, that is not a case in which there can be rectification. I do not read the passage as so stating, and I think, as at present advised, that if it did it would be too wide. I think it may well be that if the mistake has arisen from the legal effect of the language used that may provide a ground for the exercise of the court's reforming power. Subject however to that qualification, I think that the passage cited is correct.

I have dealt with the legal aspects of the matter first to get them, so to speak, out of the way, because there were other grounds upon which the learned judge came to his conclusion. It is upon those grounds that I think he rightly decided the case. I have already referred to the fact that here—and it is a curious feature of the case—the husband, through his solicitor, deliberately altered the draft from the form which it originally took to the form to which he now objects. The learned judge, in the course of his judgment, said that here the agreement, as evidenced by the draft as

(1) (1784) 1 Bro. C. C. 338, 341.

(2) [1937] Ch. 67.

altered, was in precisely the form which the document took, and that it was a deliberate agreement in so far as it involved a change from the form of words which the plaintiff now prefers to the form to which he now objects. I do not say that that of itself would be fatal to the husband's case, but I am bound to say that I think it is material, in considering whether the court should exercise its equitable jurisdiction, that it should be asked to do so at the suit of a plaintiff who has to come forward and say: "This error was due to my own alteration of the draft; it is true that my wife accepted it, but, as appears from the evidence, I cannot show that this question of tax was ever a matter with which she was concerned or that it was ever present in the least in her mind." If the unfortunate result is due to the mistake made by the legal adviser of the plaintiff, that does not seem to me to be a good ground for saying that there should now be rectification, and rectification at a time when *inter partes* there is no issue or substantial question.

The only real matter of substance is that, as a consequence of the mistake, the position of the plaintiff as regards the taxing authorities has been affected and, as it turns out, adversely affected. The ground, however, upon which I prefer to base my conclusion is that which I have already indicated—that, having regard to the rectification deed which followed and was a consequence of the absence of any issue at any time between the parties as to their true rights *inter se*, the necessary condition for the exercise of the reforming powers of the court is really absent. Mr. Wolfe, at the request of this court, formulated the equitable right which he said the plaintiff was entitled to assert. He formulated it thus: "When a document has been executed which does not carry out the intention of the parties, each party has the right against the other to have the document reformed in such a way that the document will place each in the same position as that which they had intended." If that be a correct formulation of the right to reform—and I am not saying that it is not—the difficulty in his way in the present case is that he has not brought the plaintiff's case within it. In the first place I venture to doubt whether it could be here alleged that this agreement does not carry out the intention of the parties. I have already referred to the way in which the alteration of the draft deed took place, and there is no evidence whatever that, so far as concerned the bargain between the two

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contracting parties, the relationship to the Revenue Authorities which resulted from the form of words selected by the husband was ever in the wife's mind. Secondly, adopting Mr. Wolfe's language, each party "has the right against the "other." Now that seems to me to postulate that in a case in which this equitable relief is sought the one party must be asserting a right against the other, and calling on the court of equity to say that it is inequitable and unconscionable for the other party to stand upon the terms of the instrument as executed. That condition is wholly absent. There never has been an issue between the parties. It has never been necessary for the husband to call upon the wife to have the document reformed. When the matter arose both agreed that it should be reformed, and reformed it has been. It follows that as between the parties no issue remains, no substantial matter which can form the basis of the claim in this court. It is to be noted that the wife took virtually no part in the proceedings in the court below, and on this appeal she has not, for obvious reasons, thought it necessary even to attend; and no order which the court makes in this action can affect her legal position under the deed as modified by the supplemental deed in the smallest degree. She is not therefore in any way interested in the point raised, nor indeed are the trustees. There is in truth before the court no person interested on whose conscience it can be suggested that a court of equity should operate in ordering rectification.

I proceed to the conclusion of Mr. Wolfe's formulation of the equitable right when he uses the words "to have the "document reformed in such manner that the document "will place each in the same position as that which they "intended." I think that must be qualified by saying, "In the same position vis-à-vis each other as they intended," and that, as I have said, has already been done. I quite agree that the case on the facts has worked somewhat of a hardship on the plaintiff. Had the plaintiff, having got the document in its original form as executed, stood upon the strict rights which it conferred, I am sure that the other party, namely, the wife, could successfully have sued him for rectification; and if the document had then been rectified, in its rectified form the husband would have had an advantage which, as things have turned out, and on the view of the learned judge and of this court, he does not now get. But, of course, that is assuming that the husband

withstood the wife's claim and asserted that his only obligation was for the net figure.

However that may be, if there be a hardship it is not, in my judgment, sufficient to state, as Mr. Honeyman puts it, that as things have turned out the parties cannot now do that which will put the husband in the position he would have been in as regards third parties. Had the document taken the other form, it is true, that would have been the position ; but in my judgment that is not a sufficient ground for saying that in an action of this kind the court can, or at any rate ought to, rectify the instrument. I have not found it necessary to deal fully with all the points which were covered by the learned judge, and I have ventured to take a rather different view from his in regard to the decision of Clauson J. But I come to the conclusion that the judgment below was correct and that the appeal accordingly fails.

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COHEN L.J. : I too am of the opinion that this appeal fails. I very much doubt whether at any time the plaintiff had a cause of action against his ex-wife, the first defendant, in respect of the matters alleged in the pleadings. The mistake, if mistake it be, had given him no cause of complaint against his ex-wife, whatever may have been the effect of the mistake on his position vis-à-vis the Revenue Authorities ; but even if he ever had any cause of action against his ex-wife in respect of the matters in question, all possible dispute between the parties to this action was removed by the supplemental deed of March 13, 1948. In the result, when the matter came before the learned judge on March 11, 1949, there was no issue between the parties that the judge could determine. I cannot think that in those circumstances it would have been right for the judge to grant the discretionary remedy of rectification. Mr. Wolfe and Mr. Honeyman submitted that the effect of refusing it would be to deprive their client of the benefit which, from the point of view of surtax, it was intended he should have ; but there is no evidence that it was the common intention of the parties to secure him that benefit. The defendant's solicitor, who conducted the negotiation on her behalf, made it plain that his mind was never directed to the surtax position. If therefore this element can ever be material in influencing the judge in deciding whether to exercise his discretion and grant rectification, this is not a case where it should be granted.

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What I have said is sufficient to dispose of the matter. But the learned judge gave a secondary reason for his decision, namely, that he was not satisfied that the parties ever had made the agreement which the plaintiff sought to introduce into the deed. He based this conclusion on the ground that the language used had been deliberately introduced into the deed by the plaintiff's solicitors, despite the fact that the alternative language which it is now sought to substitute had been proposed by the wife's solicitors. It is not necessary to reach a definite conclusion on this point, but I must observe that if the husband had refused to execute the supplemental deed and the wife had commenced proceedings for rectification against him, and had supported her claim by the evidence of the solicitors given in this action and by the documents, that claim would have succeeded. Such a decision would have accorded with that of Clauson J. in *Jervis v. Howle and Talke Colliery Co.* (1), to which my Lord has already referred, a decision with which I respectfully agree.

For those reasons I would dismiss the appeal.

ASQUITH L.J.: For the reasons given by my Lords, to which I cannot usefully add, I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for all parties appearing: *Kimber Bull & Co.*

(1) [1937] Ch. 67.

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In re BRADSHAW.

BRADSHAW *v.* BRADSHAW AND ANOTHER.

Administration—Lunacy—Intestacy—Devolution—"Beneficial Interest in real estate"—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 51, sub-s. 2.

Section 51, sub-s. 2, of the Administration of Estates Act, 1925, does not apply to a beneficial interest in an undivided share of freeholds, because that is not a "beneficial interest in real estate" within the meaning of that sub-section.

In re Donkin [1948] Ch. 74, applied.

ADJOURNED SUMMONS.

Constance Mary Bradshaw was the daughter of Thomas Bradshaw (who died on November 30, 1906) and the grand-

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

daughter of William Bradshaw (who died on July 12, 1855). By his will dated January 22, 1853, William Bradshaw devised certain freehold estates on trust for his son Thomas Bradshaw for life, and after his death, in default (which happened) of appointment by Thomas Bradshaw, on trust for such of Thomas Bradshaw's children as should attain the age of 21, or being female attain 21 or marry, equally. Thomas Bradshaw died in 1906 leaving five children who had then all attained the age of 21: (1.) Thomas Clarence Bradshaw who died on June 6, 1946, leaving issue, the defendant Hengist Richard Edward Bradshaw; (2.) Percival Edward Bradshaw, who died on February 16, 1941, without issue; (3.) Alfred Ernest Bradshaw, the plaintiff; (4.) Constance Mary Bradshaw; (5.) John Horsley Bradshaw, who died on July 15, 1927, leaving issue, the defendant John S. Bradshaw.

In 1912 Constance Mary Bradshaw became of unsound mind. A receiver was appointed on July 22, 1935, and he had not been discharged when she died on September 2, 1948, intestate and a spinster. On March 19, 1949, letters of administration of her estate were granted to her brother, the plaintiff Alfred Ernest Bradshaw, and her nephew, Hengist Richard Edward Bradshaw, who was also her heir-at-law under the law of inheritance in force before the coming into force of the Administration of Estates Act, 1925.

A summons was taken out by Alfred Ernest Bradshaw to determine whether the interest of Constance Mary Bradshaw in the freeholds devised by her grandfather, some of which remained unsold, was or was not, at the time of her death, a beneficial interest in real estate within the meaning of s. 51, sub-s. 2 of the Administration of Estates Act, 1925 (1). It was not disputed that the other conditions in that sub-section were fulfilled.

N. S. S. Warren for the plaintiff.

A. H. Droop for the heir-at-law of the intestate: The interest which the intestate had at the time of her death in the freeholds devised by her grandfather was a

(1) Administration of Estates Act, 1925, s. 51, sub-s. 2: "The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a	"lunatic or defective living and "of full age at the commencement "of this Act, and unable, by "means of his incapacity, to make "a will, who thereafter dies "intestate in respect of such "interest without having
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"beneficial interest in real estate" within the meaning of s. 51, sub-s. 2 of the Administration of Estates Act, 1925. The object of that subsection is to preserve to the heirs of persons of unsound mind who were incapable of making valid wills the expectations in realty which those heirs had under the law of inheritance in force before the Act was passed. That object is achieved where the intestate was at his death entitled to an entirety; and it must have been intended that the provision should also apply where he was at his death entitled to an undivided share, for before the passing of the Act there was no difference between the devolution on intestacy of entireties and of undivided shares. If, therefore, the subsection does not apply to undivided shares, its object has to that extent been defeated by defective drafting.

"Real estate," in s. 51, sub-s. 2, means in effect "hereditaments," which under the pre-1926 law of inheritance would have descended to the heir on an intestacy. In s. 45, "real estate" is used in this sense of "hereditament" and, it is evidently used in the same sense in s. 51, sub-s. 2. The definition of "real estate" in s. 55 does not apply. Section 51, sub-s. 2 does not require that the beneficial interest of the intestate at the time of his death should itself be "real estate." All it requires is that it should be an interest in real estate. *In re Mellish*, footnoted in *In re Wheeler* (1), which was approved in *In re Kempthorne* (2) and *In re Fuller's Contract* (3), may be referred to as showing that the interest of the intestate could properly be described as an interest in real estate in spite of the statutory conversion. [*In re Harding* (4) also referred to.] The ground of decision *In re Donkin* (5) is inconsistent with the foregoing argument though that decision could be supported on other grounds.

"recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act, applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case. For the purposes of

"this subsection, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged."

(1) [1929] 2 K. B. 81, 82 n.

(2) [1930] 1 Ch. 268, 293.

(3) [1933] Ch. 652, 656.

(4) [1934] Ch. 271.

(5) [1948] Ch. 74.

T. K. Wigan for one of the next-of-kin of the intestate. The interest of the intestate had become personalty at the date of her death and was not a beneficial interest in real estate for the purposes of s. 51, sub-s. 2. The land might have been sold at any time after 1926; and if it had been the intestate's share would have been paid to her receiver as money, and at her death s. 51, sub-s. 2 clearly could not have applied. It would be a capricious result if the devolution of a lunatic intestate's undivided share in realty were to depend upon the accident of whether the trust for sale has been carried out before the death or not.

An undivided share is not an interest in real estate. It is true that persons interested in land subject to a trust for sale have an interest in land; but they have only the right to receive the rents and profits until sale, and their substantive interest is in the proceeds of sale. These are clearly personalty. *In re Donkin* (1) is relied on. The definition of real estate in s. 55 is material. That definition applies to Part IV just as much as to any other part of the Act except "as otherwise provided." The definition in s. 55 leads back to s. 3, which defines "real estate" as including chattels real but excluding money arising under a trust for sale. As for s. 51, sub-s. 2, this definition cannot be applied in its entirety because s. 51, sub-s. 2 (which is in Part IV) expressly excludes chattels real. That is why the words "save as provided in Part IV" are necessary in s. 55. But the rest of the definition applies, including the part which excludes the proceeds of sale of land held on trust for sale. Consequently, a beneficial interest in the proceeds of a trust for sale is not within s. 51, sub-s. 2.

The policy of the Act is not to preserve all expectant interests in the estate of lunatics because they are unable to make valid wills. The devolution of personal estate is unaffected, but the Act has expressly excepted interests in real estate. In any case the general policy of the Act does not give any assistance in deciding whether an interest is or is not an interest in real estate.

Cur. adv. vult.

Nov. 3. DANCKWERTS J. [reading his judgment, stated the facts and continued:] It is clear that on December 31, 1925, the intestate was entitled, and if the Administration of Estates Act, 1925, had not been passed

(1) [1948] Ch. 74.

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and the former law were still in operation, would at the date of her death have been entitled, in equity and beneficially, to an undivided share in the freeholds, which share would have been real estate and would have passed to her heir-at-law. Under s. 51, sub-s. 2 of the Administration of Estates Act, 1925, however, the question is whether, at the date of her death, the intestate was entitled to a beneficial interest in real estate.

The legislation of 1925 deprived the intestate of her former undivided share in the freeholds and, instead, gave her a right to a share of the proceeds of sale and of the income pending sale (s. 35 of the Law of Property Act, 1925). None the less, there is, it seems to me, undoubted authority that the interests of the intestate were properly to be described as an interest in real estate, at any rate for many purposes: see *In re Mellish* (1), referred to with approval in *In re Kempthorne* (2); and *In re Fuller's Contract* (3); and it seems not unreasonable to suppose that, as the undivided share in the land in equity would have devolved before 1926 on the heir-at-law, the intention of the sub-section was that the heir-at-law should not be deprived of his expectation that he would inherit the property. The sub-section, however, concentrates on the beneficial interest which the intestate had at the date of her death. *Prima facie*, the conditions of the sub-section would seem to be satisfied if it was then an interest in real estate, even if the beneficial interest itself was not then real estate.

There are a number of references in the Administration of Estates Act, 1925, to "real estate", and, generally, they do not appear to clarify the matter. Section 33 imposes a trust for sale on the "real estate" of a person who dies intestate; s. 45, abolishing the old rules of descent, refers to the "real estate and personal inheritance" of persons dying after 1925; and s. 52 contains a definition of "real and personal estate." An argument against the heir-at-law was, however, founded on s. 55, sub-s. 1 (xix), which is in these terms: "'real estate' save as provided in 'Part IV of this Act' (which includes s. 51) 'means real estate, including chattels real, which by virtue of Part I of 'this Act devolves on the personal representative of a deceased person.'" It is said that this refers back to s. 1 (which provides for the devolution on the personal representative of

(1) [1929] 2 K. B. 82 n.

(3) [1933] Ch. 652.

(2) [1930] Ch. 268 293.

"real estate to which a deceased person was entitled for an "interest not ceasing on his death"), and so invokes the interpretation provision (for the purposes of Part I) that "real estate" includes "real estate held on trust (including "settled land) or by way of mortgage or security, but not "money to arise under a trust for sale of land, nor money "secured or charged on land": s. 3, sub-s. 1 (ii). It is said that the effect is to exclude from "real estate" for the purposes of s. 51, sub-s. 2 (which is in Part IV) money to arise under a trust for sale of land. This argument, however, does not seem to me to give proper effect to the exception in s. 55, sub-s. 1 (xix), of the provisions of Part IV., and I do not find it convincing.

There is, however, a decision of Roxburgh J. on the actual sub-section which I have to construe. *In re Donkin* (1) was concerned with the estate of a person of unsound mind, who died a spinster and intestate in 1934. In 1928 she had become entitled as the sole next-of-kin of her brother on his death in that year. No letters of administration had been obtained in respect of his estate, which included freehold houses. After the death of the sister the Public Trustee obtained letters of administration in respect of each estate. The facts differ in some respects from the present case, but by reason of the imposition of a trust for sale on the brother's property by s. 33 of the Administration of Estates Act, 1925, the question which arose in that case is similar to that which I have to decide. Roxburgh J. says (after reading s. 51, sub-s. 2 (2)): "It seems to me that in "order to make sense of that provision it is necessary to "confine the beneficial interests indicated in the opening words "of sub-s. 2 to such interests as would, in accordance with the "general law in force before the commencement of the Act, "have devolved in accordance with the law applicable to "freehold land. If that be the true meaning of the section "—and it is not altogether an easy point—then the rest seems "to me to follow as a matter of course, because nobody could "contend that before 1926 the interests of a beneficiary in the "proceeds of a trust for sale of land would have devolved in "accordance with the law applicable to the devolution of "freehold land. At any rate, nobody has so contended before "me. Accordingly, unless I can find some difference between "such a trust for sale as could exist before the commencement

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(1) [1948] Ch. 74.

(2) *Ibid.* 78.

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" of the Administration of Estates Act, 1925, and the trust
" for sale imposed by that Act in case of an intestacy, it would
" follow that the beneficial interest which Miss Donkin had
" in her brother's estate on his intestacy was not one which
" under the general law in force before January 1, 1926, could
" have devolved as freehold land. In my judgment, that is
" a good ground for holding that the interest which Miss Donkin
" had was not a beneficial interest in real estate within the
" meaning of that phrase in s. 51, sub-s. 2, of the Administration
" of Estates Act, 1925." That seems to me to be a decision
on the point which I have to decide in this case, and accordingly
I must follow it and hold that in the present case the interest
in the property devised by the will of William Bradshaw
deceased to which the intestate was entitled at her death was
not a beneficial interest in real estate within the meaning of
s. 51, sub-s. 2, of the Administration of Estates Act, 1925.
But, if that be the true interpretation of the sub-section, it
seems to me that by some mischance the drafting of the sub-
section has probably failed to carry out in this case the intention
that persons with expectations of succeeding to real estate
should not be defeated by the alterations in the law of descent
made by the legislation of 1925.

Declaration accordingly.

Solicitors : *Blyth, Dutton, Wright and Bennett.*

DANCK-
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J.

1949

Nov. 2.

In re HART'S WILL TRUSTS.

PUBLIC TRUSTEE *v.* BARCLAYS BANK LIMITED
AND OTHERS.

[1949 H. 213]

*Will—Construction—Residuary trust fund—Settlement of two-sixths for
step-children, of four-sixths for children, of testator—Provision for
accruer of two-sixths, on failure of trusts thereof, to four-sixths—No
provision for accruer of four-sixths, on failure of trusts thereof, to
two-sixths—Ultimate trusts of residuary trust fund, on failure of
trusts of two-sixths and of four-sixths, for " persons . . . at time
" of failure . . . entitled . . . under the statutes for the distri-
" bution of the personal estate of intestates . . ."—Death of*

testator after January 1, 1926—Reference to “statutes for . . . : “distribution” a reference to Administration of Estates Act, 1925 (15 Geo. V. c.23)—Rule against perpetuities—Validity of ultimate trusts of will—Death of testator childless—Hiatus in will by reason of omission of provision for accruer of four-sixths to two-sixths—Implication by court of cross-limitation carrying over four-sixths to two-sixths.

A testator by cl. 13 of his will made in 1923 settled two-sixths of his residuary trust fund in trust for his two step-children nominatim, with substitution of their issue should either predecease him. By cl. 14 he provided that, subject as aforesaid, and to the intent that the two-sixths should sink into the trust fund and be subject to the direction for appropriation in cl. 14, the trustees should appropriate the trust fund as therein directed to such of his children as should survive him or die in his lifetime leaving issue surviving him and so that, if the trusts directed in cl. 15 of any property appropriated to any child of his should fail, that property should fall into the trust fund. Clause 15 provided that property directed to be appropriated for any child or stepchild be retained and held by the trustees in settlement for the child or stepchild as therein directed: and cl. 16 that, should the trusts thereinbefore directed fail or determine, the trustees should hold the trust fund and the income thereof “in “trust for the persons or person who would at the time of the “failure or determination of all the prior trusts hereinbefore “declared and contained have been entitled to my personal “estate under the statutes for the distribution of the personal “estate of intestates if I had died at the time of such failure or “determination intestate”

The testator never had children. In 1927 he died and in 1948 his wife died, and the capital of the residuary trust fund had to be dealt with on the footing that, as he had had no children, cll. 13 to 15 of the will had effectually created trusts only in respect of the two-sixths. The will having come into operation after 1925, the artificial class of next of kin designated in cl. 16 had to be ascertained by reference to the date when the preceding trusts failed and to Part IV. of the Administration of Estates Act, 1925. Also, by reason of the statutory trusts contained in s. 47 of that Act (being contingent on the beneficiaries' attaining the age of 21 years or marrying) those entitled under the Act might not necessarily be ascertainable for a period of anything up to 21 years after the testator's “notional” death, i.e., his death as described in cl. 16 by the words “if I had died at the time of “such failure or determination intestate.”

On a summons to decide whether the ultimate trust in cl. 16 was invalid as infringing the rule against perpetuities,

Held, in deciding that the provisions of cl. 16 were void: (1.) that in cl. 16 the words “failure or determination of all the “prior trusts hereinbefore declared” meant total failure of all the trusts declared in respect of the trust fund, both those of the two-sixths directed to be held in trust for the stepchildren

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and their issue and those of the four-sixths directed to be held in trust for the children and their issue; (2.) that, having regard to ss. 50 and 47 of the Administration of Estates Act, 1925, the trust contained in cl. 16 offended against the rule against perpetuities, because there might be an interest still remaining contingent at the expiration of the period allowed by the rule by reason that some person designated had not attained the age of 21 years or married; (3.) that the court could not apply ss. 47 and 50 by ascertaining the class of persons without importing into it the conditions required by s. 47 of attaining the age of 21 years or marrying, because those conditions were part of the qualification of persons who were to take; (4.) (on a question raised at the hearing) that the court could imply in the will a limitation—which the testator had omitted—carrying over the four-sixths, in the event which had happened of the testator's having no children, to the two-sixths directed to be held in trust for the stepchildren and their issue.

Rules formulated by Kay J. in *In re Hudson* (1882) 20 Ch. D. 406, 415, 416, considered and applied.

ADJOURNED SUMMONS.

A will dated July 16, 1923, provided: "Clause 12. My trustees shall pay the income of the trust fund"—i.e., the testator's residuary trust fund—"to my wife . . . during her life . . . Clause 13. My trustees shall appropriate two equal sixth parts of the trust fund (hereinafter called "the Reith portion") between and to such of my step-children [naming both of them] as shall survive me" and there was substitution of their issue in the event (which did not happen) of either predeceasing the testator. The will continued: "Clause 14. Subject as aforesaid and to the intent that the Reith portion . . . shall . . . sink into the trust fund and be subject to this present direction for appropriation my trustees shall appropriate the trust fund between and to such of my children as shall survive me or die in my lifetime leaving issue me surviving" as therein directed, "and so that if the trusts declared by cl. 15 hereof concerning any property appropriated to any child of mine shall fail . . . such property shall fall back into the trust fund . . . Clause 15. . . . all property in this my will directed to be appropriated to any child or stepchild of mine . . . shall be retained and held by my trustees upon the following trusts" in settlement for the child or stepchild with remainders over as therein directed. "Clause 16. In the event of the failure or determination of the trusts hereinbefore declared . . . my trustees

" shall hold the trust fund and the income thereof in trust
 " for the persons or person who would at the time of the
 " failure or determination of all the prior trusts hereinbefore
 " declared and contained have been entitled to my personal
 " estate under the statutes for the distribution of the personal
 " estate of intestates if I had died at the time of such failure
 " or determination intestate such persons if more than one to
 " take as tenants in common the shares in which they would
 " have taken under the same statutes."

On April 8, 1927, the testator died without having had children and survived by his wife and by the two stepchildren. On June 1, 1948, his wife died, whereupon the capital of his residuary estate fell to be dealt with on the footing that, as he had not had children, trusts had not been effectually created by cls. 13 to 15 of the will save in respect of the two-sixth parts defined as " the Reith portion." As the will came into operation after 1925, the artificial class of next of kin referred to in cl. 16 had to be ascertained by reference not only to the date of the failure of the preceding trusts but also to Part IV of the Administration of Estates Act, 1925 (see s. 50). Also, the effect of the statutory trusts contained in s. 47 of the Act (being contingent on the attainment of the age of 21 years or the marriage of the beneficiaries concerned) was that the persons entitled under the Act might not necessarily be ascertainable for a period of anything up to 21 years after the testator's " notional " death, i.e., his " death " as described in the words, in cl. 16 of the will, " if I had died at the time " of such failure or determination intestate." A question therefore arose whether the ultimate trust in cl. 16 was invalid as infringing the rule against perpetuities. Accordingly, on January 20, 1949, the Public Trustee, as sole trustee of the will, took out this summons to have determined, inter alia, whether the trust was invalid as infringing the rule. The defendants to the summons were the wife's executors (among whom were the two stepchildren) and certain of the next of kin. The two stepchildren were also personally concerned.

H. A. Rose for the plaintiff, the trustee of the will.

A. H. Droop for the wife's executors. In cl. 16 the words " and subject to the trusts powers and provisions hereinbefore " declared and contained " are really only conveyancing surplusage for " in the event of the failure or determination " of the trusts hereinbefore declared." The trusts of the

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Reith portion must be included in the words "failure or "determination of all the prior trusts hereinbefore declared "and contained." It is impossible to put any other construction on the clause, which means what it says and accordingly operates on the total failure of all the trusts, including those of the Reith portion. As the beneficiaries indicated in cl. 16 are those who "would . . . have been entitled " had the testator "died at the time of such failure or determination intestate," it is from that "notional " death of the testator that the period of 21 years is to run. Even at the expiration of 21 years from his "notional " death, there might still be some person designated by the clause who had neither attained the age of 21 years nor married and whose interest was therefore still contingent. It must accordingly follow that the ultimate trust in cl. 16 is void as infringing the rule against perpetuities.

E. I. Goulding for the sole executor of the testator's sister, representing next of kin. There is no need to read "all the "prior trusts hereinbefore declared and contained " as including all the prior trusts of the will, including those of the Reith portion. If the court feels compelled so to read it, it might just as well feel compelled to read into the clause "including "all pecuniary legacies and annuities."

N. P. M. Elles for infant next of kin. The class of persons who take under cl. 16 can be ascertained without reference to the words in s. 47, sub-s. 1, of the Administration of Estates Act, 1925, "who attain the age of 21 years or marry under "that age," for there is no need to make that class subject to the conditions of attaining 21 years or marrying.

DANCKWERTS J. [stated the facts substantially as set out above and continued :] As the testator died after 1925, the reference in cl. 16 of the will to "the statutes for the "distribution of the personal estate of intestates " is a reference to Part IV of the Administration of Estates Act, 1925. Under s. 47 of that Act the persons who are finally ascertained under the provisions of the will, instead of taking vested interests—as they would have done under the pre-1926 statutory distribution—take interests which are contingent on their attaining the age of 21 years or marrying under that age.

The question is, what is the event on which cl. 16 is to take effect? Is it a total failure of the trusts, i.e., both the trusts of the two-sixths "Reith portion" and the trusts of the four

sixths directed to be held on trust for the testator's issue or is the clause to take effect possibly more than once, on the failure which has occurred with regard to the four-sixths and not yet, possibly, with regard to the two-sixths; for, of course, the "Reith portion" may very well become vested under the provisions of the will applicable to that portion. In my view, it is plain that "failure or determination of all the prior trusts hereinbefore declared," means total failure of the trusts declared regarding the trust fund, i.e., the ultimate residuary estate. True, the clause refers to "the persons or person who would at the time of the failure or determination of all the prior trusts . . . have been entitled . . . under the statutes for . . . distribution" and refers to "the failure . . . of the . . . trusts hereinbefore declared . . .," yet the trustees are to hold the trust fund on the trusts declared by this clause. In my view, therefore, it is plain that it is the trusts of the trust fund which are referred to, and the reference is to a fund to be ascertained once and for all on the total failure of all the trusts declared in respect of the trust fund, both those of the four-sixths and those of the two-sixths.

As I have reached that conclusion, the next question is, what is the effect of the operation of this clause having regard to ss. 50 and 47 of the Administration of Estates Act, 1925? It is contended by Mr. Droop, for the wife's executors, that the trust infringes the rule against perpetuities because there might be an interest still remaining contingent at the expiration of the period allowed by the rule by reason of some person designated not having attained 21 years or married. It seems to me that that is so, and I therefore hold that the provisions of cl. 16 are void.

It was argued on behalf of the infant defendants by Mr. Elles that I was entitled to apply ss. 47 and 50 by ascertaining the class of persons without importing into it the conditions required by s. 47 of attaining 21 years or marrying. In my view, however, those conditions are part of the qualifications of persons who are to take. That argument therefore fails.

The question was then argued whether, as the testator had not provided for the failure (which happened) of the trusts relating to children and their issue and possible accruer to the shares of the stepchildren, the court could imply a limitation which would have the effect of adding the four-sixths to the

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two-sixths which were to be held on trust by way of settlement for the testator's stepchildren and their issue.

A. H. Droop for the stepchildren as being personally interested. For the court to be able to imply such a limitation there must be in the will a gap which, if left unfilled, would cause an intestacy ; and the court must be satisfied that the gap was unintentional and that it will not be divesting any other gift by filling it. Here, there will be an intestacy if the gap is not filled, and, quite apart from the fact that that cannot be supposed to have been the testator's intention, all the indications are that what really happened was that the testator—or the draftsman of the will—remembered to provide for accruer of the two-sixths to the four-sixths, but not of the four-sixths to the two-sixths. The omission was clearly unintentional. If the court does fill the gap, it will not thereby be divesting any other gift : for there is nothing in the will providing for what actually has happened (*viz.*, failure of the trusts for children and their issue), so that the four-sixths which are the subject-matter of those trusts will simply go as on intestacy if the court does not deal with them by filling up the gap. The court is not asked to alter the will, but simply to write into it the cross-limitation which is not in it and which would have been in it had the testator or the draftsman remembered to put it in. The rules laid down by Kay J. in *In re Hudson* (1) are complied with in this case, and the court can properly imply the cross-limitation which will add the four-sixths to the two-sixths.

E. I. Goulding for next of kin. In *In re Hudson* (1), Kay J. said : " Where there is an ambiguity it is proper to look at " the consequences of either construction." Here, although there is no express provision, the court, if it reads into the will the provision contended for on behalf of the stepchildren, may well be depriving of the four-sixths those whom the testator intended to have them, for example, his sister and her descendants, or persons claiming through her. The testator, by the very form which he has given to his will, has shown that he knew perfectly well how to direct a carry over from one part of his estate to another when he wished, for in the case of the two-sixths he did so ; and clauses 13 and 14 also show that he knew how to make such a provision. It may be that there is a gap in so far as he has not provided for accruer in the case of the four-sixths ; but there is nothing to show

that that gap is unintentional, and the resulting intestacy is certainly no proof that it is. The court ought not to fill the gap by implying the cross-limitation of the four-sixths to the two-sixths, but ought to allow the intestacy to stand.

N. P. M. Elles, for infant next of kin, adopted the last argument.

DANCKWERTS J. : Mr. Droop, on behalf of the stepchildren, has called my attention to *In re Hudson* (1), where Kay J., after referring to certain authorities, said : " I deduce from " these authorities the following rules : (1.) Cross-executory " limitations, in the case of personal estate, like cross- " remainders of real estate, are only implied to fill up a hiatus " in the limitations, which seems from the context to have " been unintentional. (2.) They cannot be implied—as, of " course, cross-remainders could not—to divest an interest " given by the will. (3.) The existence of other cross-limita- " tions between different persons does not prevent the " implication. (4.) But where such express cross-limitations " are in favour of the very persons to whom the implied cross- " limitations would convey the property, that circumstance " is of weight in determining the intention. Instances in " which a gap occurs are : (a) where there is a gift over to " several named persons for their respective lives as tenants in " common, and a gift over after the death of the survivor . . . , " (c) : And generally where, there being such a gift over, the " preceding limitations do not provide for every event, " except that contemplated by the gift over, but leave some " gap which would occasion an intestacy as to a part of the " estate." Then Mr. Goulding called my attention to a passage lower down on the same page, in which Kay J. said : " Where " there is an ambiguity it is proper to look at the consequences " of either construction." Kay J. added : " It is hardly " possible to believe that it was intended that any part of the " income should go to the legal personal representatives of " deceased grandchildren or remoter issue."

In the present case there is a final gift over which, in the events which have happened, I have held to offend against the rule against perpetuities but which, none the less, is in the will. There is thus a hiatus. If I imply a cross-limitation it plainly will not divest any interest given by the will, because there are no express provisions in the will for the particular

(1). (1882) 20 Ch. D. 406, 415.

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events which have happened. There are no express cross-limitations of such a character as to preclude me from implying cross-limitations by way of accruer of the four-sixths to the two-sixths. Mr. Goulding, however, for the representatives of the next of kin, contended with some force that, in the present case, it is more likely that the testator would have preferred that the property should go to his sister and her descendants or persons claiming through her, rather than to stepchildren who were no relations of his, and that the will shows that the testator knew perfectly well how to provide for a cross-limitation if he meant one to operate: and he referred me to the express provision in that respect in cls. 13 and 14. That is perfectly true, but it is rather difficult to speculate as to what the testator really would have preferred in any particular circumstances. On the whole, it seems to me that this case comes within the rules laid down by Kay J. in *In re Hudson* (1) and applied in a number of cases. I ought therefore to imply in the will a clause which, as Mr. Droop, for the stepchildren, pointed out, involves no alteration of the will but only the writing into it of something which is not there but which one would expect to be there. Accordingly, I feel constrained, in this case, to imply a clause (which, no doubt, could be drafted if necessary) to carry over the four-sixths in the events which have happened as an addition to the two-sixths which are to be held on trust for the testator's stepchildren and their issue.

Declaration accordingly.

Solicitors: *Wordsworth & Co.; Ager & Ager.*

K. R. A. H.

(1) 20 Ch. D. 406, 415, 416.

DANCK-
WERTS
J.

1949

Nov. 17.

In re DRIFFILL, DECD.

HARVEY AND ANOTHER *v.* CHAMBERLAIN AND OTHERS.

[1949 D. 1044]

Charity—Will—Bequest of residue to trustees “to promote the defence of the United Kingdom from the attack of hostile aircraft”—Validity.

A testatrix devised and bequeathed her residuary estate to her trustees on trust to devote the net proceeds of sale thereof “in

"whatever manner they may consider desirable to promote the defence of the United Kingdom from the attack of hostile aircraft."

Held, that the disposition constituted a valid charitable bequest.

In re Stephens (1892) 8 T. L. R. 792, and *In re Good* [1905] 2 Ch. 60, followed.

DANCK-
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J.

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ADJOURNED SUMMONS.

The summons was taken out for determination of questions arising on the will, dated April 25, 1916, of a testatrix who devised and bequeathed her residuary estate to her trustees on trust to devote the net proceeds of sale thereof "in whatever manner they may consider desirable to promote the defence of the United Kingdom against the attack of hostile aircraft."

On August 3, 1948, the testatrix died, and by this summons, taken out on June 4, 1949, the trustees asked, *inter alia*, whether the direction created a valid charitable trust or was void for uncertainty or otherwise.

J. L. Arnold for the trustees.

J. Monckton for the next of kin. This bequest is void, for it is not a "charitable" bequest at all. It goes far outside "charitable" purposes, and, since it is for the defence of the realm in time of war, is really for patriotic purposes. "Whatever manner they may consider desirable" might well include the running of a newspaper or of a candidate for Parliament, if the trustees so chose. Moreover, in this context, the phrase "the United Kingdom" means not the geographical territory but the political entity. That could place the trustees of the will in a predicament in the event of war between Eire and the remainder of what, when the testatrix made her will, was the United Kingdom of Great Britain and Ireland: for it might very well be that, under the terms of the will, they would have to support both combatants. Again, it cannot soundly be contended that the gift in the present case is in the same category as that "unto my country England for own use and benefit absolutely," which was held valid in *In re Smith* (1). In *Williams' Trustees v. Inland Revenue Commissioners* (2) Lord Simonds said that that gift could be justified on the ground that "where a purpose is defined, a charitable purpose is implicit in the context; it is at least

(1) [1932] 1 Ch. 153.

(2) [1947] A. C. 447, 459.

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“ not excluded by the express prescription of ‘ public ’ purposes. Where the gift is localized but the nature of the benefit is defined, no reconciliation ” [sc. with the authorities which the noble and learned Lord had quoted] “ is possible except on the assumption that the particular purpose was in each case regarded as falling within the spirit and intent of the preamble to the statute of Elizabeth.” Those last words exactly cover the present case. Here the gift is localized (for it is to the testatrix’ trustees) and the nature of the benefit is defined in the most precise terms : for “ defence from the attack of hostile aircraft ” is as definite “ as a purpose could well be, whereas “ for own use and benefit “ absolutely,” leaves discretion in the mode of application completely unfettered.

Denys Buckley for the Attorney-General. This is a valid charitable gift, as tending to the personal efficiency of the armed forces : *In re Stephens* (1) *In re Good* (2).

DANCKWERTS J. [stated the facts substantially as set out above and continued:] Mr. Monckton contended for the next of kin that the bequest is void because it is really for patriotic purposes and exceeds the ambit of “ charitable ” purposes in the legal sense ; that it would include the promotion of a newspaper or the support of a political candidate if those methods might be considered by the trustees “ to promote the defence “ of the United Kingdom from the attack of hostile aircraft ” ; that reference to “ the United Kingdom ” was reference to a political entity rather than to a territorial conception ; and that therefore (if I understood his argument correctly) if there were to be a war—an unthinkable situation to me—between Eire and the rest of the former United Kingdom of Great Britain and Ireland, the trustees might find that they had to support both sides. That seems to be a far-fetched interpretation of the gift in the present case. The bequest is quite obviously limited to the defence of the United Kingdom of which the testatrix was a citizen. Its purposes would, I think, be confined to the defence of the United Kingdom as constituted from time to time. Further, it seems to me that it is intended to promote the protection of the United Kingdom by means of the armed forces of the Crown from the attack of hostile aircraft.

(1) (1892) 8 T. L. R. 792.

(2) [1905] 2 Ch. 60.

Mr. Monckton further contended that *In re Smith* (1), where a gift "unto my country England" was held to be a valid charitable bequest, was distinguishable on the ground suggested by Lord Simonds in *Williams' Trustees v. Inland Revenue Commissioners* (2). It seems to me that this is a case clearly falling within the well-known authorities in which gifts for promotion of the efficiency of the armed forces of the Crown were held to be valid charitable bequests.

I was referred by Mr. Buckley, for the Attorney-General, to *In re Stephens* (3), and *In re Good* (4). In *In re Stephens* (3) the bequest was to the National Rifle Association for "a fund "to be expended for the teaching of shooting "at moving objects so as to prevent a "catastrophe similar to that at Majuba Hill." Kekewich J. held that the reference to Majuba Hill and the latter part of the bequest generally showed that the gift was charitable as directed to promoting the efficiency of the armed forces.

Similarly, in *In re Good* (4), which is otherwise on its facts rather different from the present case, Farwell J. said: "I have "come to the conclusion that this is a good charitable gift "on the first ground—namely, that it is a direct public benefit to "increase the efficiency of the army, in which the public is "interested, not only financially, but also for the safety and "protection of the country."

It seems to me that those two authorities exactly cover the gift in the present case, and I therefore hold that this is a good charitable bequest.

Declaration accordingly.

Solicitors: *Druces and Attlee, for Calthrop & Leopold Harvey, Spalding; Treasury Solicitor.*

(1) [1932] 1 Ch. 153.

(2) [1947] A. C. 447, 459.

(3) 8 T. L. R. 792.

(4) [1905] 2 Ch. 60, 66.

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1949

Nov. 1.

SPEYSIDE ESTATE AND TRUST CO. LD. *v.*
WRAYMOND FREEMAN (BLENDERS) LD.
(IN LIQUIDATION).

[1949 S. 1909]

Procedure—Discovery—Application before delivery of statement of claim—Exceptional circumstances—R. S. C. 1883 Or. 31, rr. 12, 14.

The court has jurisdiction under R. S. C. Or. 31, r. 14, to order discovery of documents before delivery of a statement of claim, but it is a jurisdiction which should only be exercised in very exceptional circumstances.

The defendant company received, as fiduciary agents for the plaintiffs, certain moneys which were paid into the defendants' account and mixed with their own moneys. Only a small part of that for which the defendant company were accountable to the plaintiffs was paid over to them, and the balance was still outstanding when the defendant company went into voluntary liquidation. The plaintiffs, in an action to trace the money due to them, claimed that they were entitled to a charge on certain bank-notes which had been withdrawn from the defendant company's bank account and were now held by their liquidator. The plaintiffs contended that, unless they had prior discovery of the company's bank pass sheets covering the period between the receipt of the money and the withdrawal of the bank-notes, they were not in a position to deliver an initial statement of claim which would not subsequently require substantial amendment. By this summons they asked for discovery limited to those documents, notwithstanding that they had not delivered a statement of claim.

Held, that the plaintiffs had established such exceptional circumstances as to justify the making at that stage of an order for discovery as prayed.

Gale v. Denman Picture Houses Ltd. [1930] 1 K. B. 588, applied.

PROCEDURE SUMMONS.

The plaintiffs, Speyside Estate and Trust Co. Ltd., took out in this action a summons asking for discovery limited to certain documents, notwithstanding that they had not yet delivered a statement of claim.

On December 24, 1947, a considerable number of bottles of whisky were warehoused in the name of the plaintiff company but under the control of the defendant company, Wraymond Freeman (Blenders) Ltd. The documents of title with endorsements in blank were held by the defendants as the plaintiffs' fiduciary agents for the purpose of selling the whisky. Between December 24, 1947, and January 19, 1948, the whole of the stock was sold. The proceeds, aggregating 15,619*l.* 10*s.* 10*d.*, were paid by the defendant

company into their own banking account so as to become mixed with their own moneys. Between February and March, 1948, the defendants paid various sums on account to the plaintiffs. In March, 1948, the balance owing to the plaintiffs by the defendants was, according to the plaintiffs' case, 9,269*l.* os. *1d.* On March 26, 1948, the defendant company withdrew from their banking account 15,510*l.* in five-pound notes. Those notes were paid over to one White for a particular purpose not material to this case. White absconded with the money, but later he was apprehended, prosecuted and convicted. In November, 1948, the police recovered 10,800*l.* of the original five-pound notes. They handed those notes over to the liquidator of the defendant company, who were by that time insolvent and in voluntary liquidation. The plaintiffs by this action asked for a declaration that they were beneficially entitled to a charge of 9,269*l.* os. *1d.* on those notes in priority to all interests in them of the defendant company; alternatively, for a declaration that they were entitled, to the exclusion of the defendant company, to the sum of 9,269*l.* os. *1d.*, part of the 10,800*l.* received by the liquidator from the police.

The documents for discovery of which the plaintiffs asked consisted of the defendant company's bank pass sheets covering the period from December 24, 1947, until March 27, 1948, inclusive.

J. L. Arnold for the plaintiff company. The plaintiffs' application is for discovery limited to certain documents. The application is made under Or. 31, rr. 12 and 14 (1).

(1) R. S. C. Or. 31, r. 12 : "far as the court or judge shall
 "Any party may . . . apply "be of opinion that it is not
 "to the court or a judge for "necessary either for disposing
 "an order directing any other "fairly of the cause or matter
 "party to any cause or matter "or for saving costs."
 "to make discovery on oath of Rule 14 : "It shall be lawful
 "the documents which are or have "for the court or a judge, at
 "been in his possession or "any time during the pendency
 "power, relating to any matter "of any cause or matter, to
 "in question therein. On the "order the production by any
 "hearing of such application the "party thereto, upon oath, of
 "court or judge may . . . "such of the documents in his
 "make such order, either generally "possession or power, relating
 "or limited to certain classes of "to any matter in question in
 "documents as may, in their or "such cause or matter, as
 "his discretion, be thought fit. "the court or judge shall
 "Provided that discovery shall "think right . . ."
 "not be ordered when and so

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Gale v. Denman Picture Houses Ltd. (1) shows that the court has jurisdiction to make an order for discovery at this stage, although it is only made in very exceptional circumstances. It is admitted that a heavy burden rests on the plaintiffs to establish their case on the present application, but the circumstances are such that, without discovery at this stage of these documents, the plaintiffs cannot deliver a satisfactory statement of claim. The cause of action is clear, but the way in which the claim can be made must depend on how the defendant company operated their banking account at the material dates. It may be that some of the plaintiffs' money or all of it was withdrawn. The framing of the plaintiffs' claim must depend on that information. Discovery of the pass sheets is bound to be given eventually. It would save expense to make the order now. Any statement of claim drawn before discovery of them is bound to require substantial amendment subsequently.

J. V. Nesbitt for the defendant company. The plaintiff must put in a statement of claim before he is entitled to discovery. I also rely on *Gale v. Denman Picture Houses Ltd.* (2). In that case Lawrence L.J. said that an order for discovery at such a stage is contrary to practice, and that applications for it should be discouraged.

Here the plaintiffs have exaggerated the exceptional nature of the circumstances. The plaintiffs' case ought to be disclosed before any order for discovery is made. There is no reported case where an order for discovery has been made at this stage. The consideration that the plaintiffs will be entitled to discovery of these documents at a later stage is no argument for their obtaining it now. It would be going against well-settled practice to accede to this application.

Arnold replied.

WYNN-PARRY J. [stated the facts and continued:] It is clear that—the defendant company being in liquidation and, as I understand, insolvent—an action merely for an account would be of little avail to the plaintiff company. It is for that reason that they seek in effect to trace through the banking account, and to fasten upon, the sum of 10,800*l.* recovered by the police and handed over to the liquidator of the defendant company.

The summons asks for disclosure limited to the relevant

(1) [1930] 1 K. B. 588, 591.

(2) *Ibid.* 592.

bank pass sheets of the account in question between December 24, 1947, and March 27, 1948, and asks that that discovery may be ordered at this stage, before the delivery of the statement of claim. The ground of the application is that the plaintiff company's counsel is not in a position, before that discovery, to deliver a satisfactory statement of claim, or, indeed, any other document than one which must, as regards the period subsequent to the sale of the whisky, be of the most sketchy character and one which later in the action will be almost certain to require very substantial amendment as regards that period.

The jurisdiction invoked is founded on Or. 31, rr. 12 and 14. [His Lordship read the rules and continued:] It will appear from a mere reading of r. 14 that there must be jurisdiction in the court to make the order for which the plaintiffs ask, if the court should be so minded; and that that interpretation of the rule is correct is borne out by *Gale v. Denman Picture Houses Ltd.* (1). That was a case in which the plaintiff had been the controller of one of the departments of the defendant company. A dispute arose between him and the defendant company as to whether or not in the given circumstances he had ceased to be a director. The plaintiff by his solicitors asked the defendants for a copy of certain minutes relating to an exchange of shares on an amalgamation, the effect of that exchange being, in the contention of the defendants, an answer to the plaintiffs' case. That request was refused, and, the writ having been issued, the plaintiff, before delivery of his statement of claim, applied on a summons for directions that the defendants should forthwith be given copies of their minutes relating to exchange of shares. The master made an order in favour of the plaintiff which, with slight variation, was confirmed by MacKinnon J. The defendants appealed to the Court of Appeal, who reversed the order upon the basis that the court would not, save in very exceptional circumstances, order a defendant to produce documents in his possession before the plaintiff had delivered his statement of claim. The court, which consisted of Scrutton and Lawrence L.JJ., made it clear in their judgment that jurisdiction to accede to the application was vested in them. They emphasized, however, that the jurisdiction was one which should be used sparingly and only in exceptional circumstances. They made it clear that they did not regard

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the circumstances of the particular application as amounting to such very exceptional circumstances as would alone justify the making of an order. It is, I think, sufficient to refer to this passage from the judgment of Lawrence L.J. (1) : "Before delivering his statement of claim he"—that is the plaintiff—"applied for the production by the defendants "of certain minutes of directors' meetings at which he "had been present. I have listened in vain for any state- "ment by counsel that the production of these minutes is "essential to the statement of the plaintiff's claim. So far "as I can see there is no difficulty in the way of the plaintiff "stating his claim without the production of those minutes, "though I appreciate that they may have an important "bearing upon the question whether the claim is well founded "or not. It may well be that after the statement of claim "and the defence have been delivered, production of the "minutes will not be resisted. At the proper stage of "the action all documents relating to any matters in "question will have to be discovered. I however deprecate "the idea that a plaintiff, after issuing a writ and before "delivering his statement of claim, can apply for discovery. "This is entirely contrary to the practice, and such an applica- "tion should be discouraged."

Where the Lord Justice said that he deprecated the idea that a plaintiff, after issuing a writ and before delivering his statement of claim, should apply for discovery, I take him to have meant only that he considered that such an application could properly be made in exceptional circumstances, and not, as suggested to me, that no such application could be made in any circumstances : because (although he went on to point out that it was the settled practice of the court not to make an order before the delivery of the statement of claim "save "under the most exceptional circumstances"), at the beginning of his judgment he said (1) : "The jurisdiction of the "court to order discovery at any stage of an action is "undoubted"

The only question, therefore, which arises for consideration on this summons is whether or not the circumstances of this case are so exceptional as to warrant a departure from what undoubtedly is the settled practice of not ordering any discovery, however limited, before the delivery of the statement of claim. It has been asserted by Mr. Arnold and it has been

admitted by Mr. Nesbitt that—at any rate so far as can be seen at this stage of the proceedings—the documents for which discovery is called are documents which at some stage of the action must be the subject of discovery. Mr. Nesbitt has with force pointed out that that circumstance of itself affords no ground for making an exceptional order for discovery before delivery of the statement of claim. But in my view it is a relevant point for the court to take into consideration.

It is manifest that, in such a case as this, time and costs will be saved if I make the order in question. I state that because I wish to make it clear that the decision at which I have arrived is not grounded on that reason. I have clear direction, both from the relevant rules and from authority, that I must discover exceptional circumstances before I can make the order asked for, however strongly every dictate of common sense may press on me the advisability of making it.

This, as I have pointed out earlier, is an action to trace. There can be no doubt that, as regards the earlier circumstances, no difficulty stands in the way of the pleader of the statement of claim in setting out clearly, fully and intelligibly the case on which he relies, and Mr. Arnold quite rightly does not for one moment quarrel with that. There can be no doubt that the statement of claim can be fully stated down to the point where the defendant company received the proceeds of the sale of whisky and mixed it with their own moneys. From that point onwards different considerations appear to me to arise. It has been urged by Mr. Nesbitt who, with his usual skill, took upon himself the task of indicating what would be the form of the plaintiff's statement of claim from that point, that he is entitled to know what the plaintiff's case is before any discovery is given. With that as a general proposition I have not the slightest quarrel. On the other hand, Mr. Arnold, while conceding that he can plead with sufficient particularity up to the point where the proceeds of the sale of whisky were mixed by the defendant company in their account, contends that in respect of the period thereafter his statement of claim must in the nature of things be of the sketchiest possible character and one which almost certainly will require amendment, and probably substantial amendment, when the documents in question, the few relevant bank pass sheets, are later discovered in the action. In my judgment there is great force in that submission.

I have had the advantage of hearing also Mr. Arnold's

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sketch of the form which the later paragraphs of his statement of claim would have to take in the present circumstances if the order asked for were not made. In my view a judge is entitled to draw on his own past experience as a pleader in addition to considering and weighing the opposing views of the two pleaders before him, and I entertain no doubt that the true conclusion is that, if the order asked for is not made, then, unless a miracle of speculation is achieved by the pleader of the statement of claim in the present circumstances, most substantial amendments will have to be made. This is because of the peculiar and unusual nature of the cause of action, and because of the circumstance, on the allegation of which the action is founded, that the defendant company were trustees of the money in question for the plaintiff company, and that the defendant company, and the defendant company alone, know what dealings have taken place with that money. I am therefore constrained to the view, and I find myself thankful that I am constrained to it, that this is an exceptional case, and that, treating it as an exceptional case, I ought to exercise the undoubted jurisdiction which I have and make the order for which the plaintiffs ask.

Application granted.

Solicitors : *Wigan & Co. ; Judge & Priestly.*

I. G. R. M.

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Oct 21, 26 ;
Nov. 4.

[1949, G, 689.]

In re GILLETT'S WILL TRUSTS.

Will—Construction—Future vested but defeasible gift—Intermediate income not carried.

Will—Construction—Income undisposed of—Payment thereof of legacies—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 34, sch. I, Part II, para. 1.

A future vested but defeasible testamentary gift does not, in the absence of a direction to the contrary in the will, carry the intermediate income.

A testator who died on December 24, 1942, by his will bequeathed annuities to four persons for their respective lives. He directed "that in order to meet the said annuities my trustees shall . . . have power to utilize and employ capital or income or both . . . And as to any balance remaining of my residuary trust funds after the provision and payment of all the aforesaid annuities my trustees shall stand possessed thereof . . . in trust on the decease of the survivor of the above first named four annuitants . . ." in varying specified proportions for seventeen named persons absolutely, but liable to be divested by certain substitutional gifts. He made no disposition of any surplus income there might be from the residuary trust funds pending the death of the survivor of the four annuitants; and after the death of two of them there was such a surplus.

Held, that the surplus income was undisposed of by the will.

Held, further, that there was no express direction in the will to displace the general rule in sch. I, part II, para. 1, of the Administration of Estates Act, 1925, that the undisposed income should be applied towards payment of legacies, since the testator was not aware that he was leaving it undisposed of, and it could not be inferred what disposition (if any) he might have made thereof had he been so aware.

In re Oliver [1947] 2 All E. R. 162, followed. *In re Lindo* (1888) 59 L. T. 462, not followed. *Bective v. Hodgson* (1864) 10 H. L. C. 656, and *Berry v. Green* [1938] A. C. 575, considered.

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ADJOURNED SUMMONS.

The testator, Joseph Ashby Gillett, made his will on April 21, 1942, and a codicil on October 15, 1942. He died on December 24, 1942. His will contained the following dispositions: "I give and devise to my wife Sarah Beatrice Gillett all the remainder of my real estate for her life she keeping the same properly insured against loss or damage by fire and after her death I give and devise the same to my trustees upon trust to sell call in and convert the same into money and the net proceeds of sale shall fall into and form part of my residuary trust funds . . . I give devise and bequeath unto my said trustees all the remainder of my personal estate upon trust to sell call in and convert into money the same or such part thereof as does not consist of money and out of the proceeds thereof and out of my ready money to pay my funeral and testamentary expenses and debts and all the duties due to the Government and the expenses of proving this my will and invest the balance of the said moneys (hereinafter called 'my residuary trust funds') with power to vary such investments as are herein after authorized by me and to stand possessed thereof

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“ and the income arising therefrom upon trust as follows :
 “ To raise and pay the following annuities as from the date
 “ of my death, namely : To my wife the said Sarah Beatrice
 “ Gillett an annuity of 3,000*l.* during her life. To my sister,
 “ Elizabeth Rachel Gillett an annuity of 300*l.* during her life.
 “ To my sister Mary Katherine Gillett an annuity of 50*l.*
 “ during her life. To my sister Margaret Gillett, an annuity
 “ of 300*l.* during her life. I give to my sister Sarah Mabel
 “ Warner an annuity of 300*l.* to be paid to her, if living, until
 “ the death of the survivor of the above-named four annuitants
 “ and on the death of such survivor I direct my trustees to
 “ purchase for the said Sarah Mabel Warner, if living, an
 “ annuity of 300*l.* during the remainder of her life. And
 “ I declare that in order to meet the said annuities my trustees
 “ shall in their absolute and uncontrolled discretion have
 “ power to utilize and employ capital or income or both for
 “ the purpose of paying the said annuities or any of them
 “ or for purchasing the said annuity for the said Sarah Mabel
 “ Warner as aforesaid. And as to any balance remaining
 “ of my residuary trust funds after the provision and payment
 “ of all the aforesaid annuities my trustees shall stand possessed
 “ thereof in trust for all or such one or more exclusively of
 “ the others or other of my brothers, sisters, nephews, nieces,
 “ great nephews and great nieces at such time and if more
 “ than one in such shares and with such gifts over and such
 “ provisions for maintenance advancement and benefit as
 “ my wife shall by deed revocable or irrevocable or by will
 “ or codicil from time to time or at any time appoint and
 “ in default of and subject to any such appointment in trust
 “ on the decease of the survivor of the above first-named four
 “ annuities and the provision of the annuity for the said
 “ Sarah Mabel Warner as follows : as to one equal sixth part
 “ thereof for my brother Edward Gillett absolutely but
 “ if he shall not then be living for his children in equal shares
 “ absolutely and if there shall be only one child the whole to
 “ be in trust for such one child. As to one other equal sixth
 “ part thereof for my sister Richenda Gillett for her own use
 “ absolutely but if she shall not then be living for her children
 “ in equal shares absolutely and if there shall be only one
 “ child the whole to be in trust for such one child. As to one
 “ equal twelfth part thereof in trust for my brother Henry
 “ Tregelles Gillett for his own use absolutely but if he
 “ shall not then be living for his children in equal shares

“and if there shall be only one child the whole to be in trust for such one child. As to one other equal twelfth share thereof in trust for my nephew John Bernard Gillett and Cora Gillett or the survivor of them but if they neither shall be then living in trust for their adopted child David G. Gillett, for his own use absolutely and as to the remaining one equal half part thereof in trust for the following in equal shares, namely : Francis Gillett, Joseph Adlington Gillett, Gertrude Margaret Dobrashian, Theodore Henry Dobrashian, Agnes Grace Corder, Richenda Winifred Minchin, James Cooper Gillett, Agnes Wolff, Esther Curtis, Roger Gillett, Arnold Gillett, Daphne Gillett and Mario Dobrashian for their own respective uses and benefits absolutely. But I declare that if any of them shall not then be living and shall leave a husband or wife then such husband or wife shall take such share which his wife or her husband would have taken if living, but if such husband or wife is also dead then his or her children shall take his or her share equally between them and if there shall be only one child the whole shall be paid to such one child.”

The testator made no express disposition of income to arise from the residuary trust funds and not required to answer the annuities pending the death of the survivor of the four named annuitants. His widow (one of the annuitants and life tenant of residuary realty) died on June 17, 1947, without having exercised her special power of appointment. Thereafter there was surplus income from the residuary trust funds after the payment of the outstanding annuities. A second annuitant (Margaret Gillett) died on January 16, 1948, leaving two of the four named annuitants still living.

The summons asked in what manner and for whose benefit the surplus income should be applied until the death of the survivor of the four first named annuitants ; and if it were undisposed of by the will, whether it should be applied in payment of the pecuniary legacies.

A. H. Droop for the plaintiffs, the trustees of the will.

W. M. Hunt for the defendant Charles William Gillett, one of the objects of the widow's special power of appointment. The trusts in default of appointment do not wholly exhaust the property which is subject to the power. The testator intended to make a full gift of all his property ; he assumed and expected that the donee would make an appointment

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and fill the gap. The court ought to imply a gift in favour of the objects of the power of so much as is not expressly disposed of in default of appointment: *In re Master's Settlement* (1).

C. V. Rawlence for the defendant Joseph Adlington Gillett, a member of a class of persons who would be entitled to the testator's residuary estate if all of the four annuitants were dead. The main submission for this defendant is that there is no gap. The previous argument is based on the presumed intention of the testator, but there can be no presumed intention where the testator has made an express provision: Jarman on Wills (7th ed.), pp. 629-630. There is no gap here, but a gift over. This gift is not contingent, but vested subject to being divested in certain events. This defendant has an immediately vested interest, and, subject to prior interests, is entitled to the income now.

Lindner for the defendant David Gillett, a member of a class of persons interested in the residuary estate contingently on a named residuary legatee's predeceasing the survivor of the four annuitants. It is submitted that if there were a gap the interest should be carried forward to the ultimate period of distribution. On the true construction of this will, however, there is no gap. The words of disposal of the residue are wide enough to carry the surplus income: *Berry v. Geen* (2). A gift of the balance of accumulations at a future date is sufficient to carry the intermediate income. If this were a contingent residuary gift, the intermediate income would follow the capital: Hawkins on Wills (3rd ed.) p. 53; *Trevanion v. Vivian* (3); *In re Taylor* (4). In *In re Lindo* (5), Kay J. said that a future gift of residue carried with it previous income not expressly disposed of. It is admitted that the gift in that case was contingent, and that the gift in the present case is a vested residuary interest subject to defeasance; but there is no real difference in principle between such an interest and a contingent gift. Section 175 of the Law of Property Act, 1925, does not cover this case. The court should direct that the surplus income should be accumulated for 21 years or until the death of the survivor of the annuitants (which-

(1) [1911] 1 Ch. 321.

(2) [1938] A. C. 575, 581.

(3) (1752) 2 Ves. Sen. 429.

(4) [1901] 2 Ch. 134.

(5) (1888) 59 L. T. 462, 463.

ever be the lesser period) for those ultimately entitled to the residuary trust funds.

G. Rink for the defendants Beryl Margaret Lane and Bridget Constance Lane, persons interested under any partial intestacy. In this will the words "residuary trust funds" are defined to mean only capital. A future residuary gift of personalty does not carry intermediate income. I rely on the element of futurity. There is a difference between contingent gifts and deferred gifts. In *Bective v. Hodgson* (1) the gift was contingent, and the principle there laid down by Lord Westbury L.C. does not apply. All the cases cited in Jarman, on Wills (7th ed.) p. 1007, note (p) relate (with one exception) to contingent gifts. There is no case where a future defeasible gift—as opposed to a contingent gift—has been held to carry intermediate income: Hawkins on Wills (3rd ed.), p. 53; Theobald on Wills (10th ed.), p. 130; *Weatherall v. Thornburgh* (2). *Berry v. Geen* (3) shows that deferred indefeasible gifts do not carry intermediate income. This principle should apply to a deferred gift which is defeasible. [Counsel also referred to *Green v. Ekins* (4) and *Talbot v. Jevers* (5).] Alternatively, it is submitted that there are words in the will to exclude the implication that, where no express trust of the income of a trust fund is declared, it follows the destination of the capital as an accretion to it: *Wharton v. Masterman* (6). The dictum of Kay J. in *In re Lindo* (7) was, in the circumstances of that case, merely obiter. The matter is still open for decision: *In re Travis* (8), Hawkins on Wills (3rd ed.), p. 249. [Counsel also referred to s. 175 of the Law of Property Act, 1925.]

Droop (as amicus curiæ). The question was before Jenkins J. in *In re Oliver* (9). He held that (in contrast with a contingent gift) a future vested gift did not carry intermediate income; and he treated the point as well settled.

Lindner in reply. The "balance remaining" means balance of capital and income—which cannot be ascertained until the death of the last surviving annuitant. Nor can those to participate in it be ascertained until that date. If distribution is postponed, the income should for the statutory period be accumulated and held for the beneficiaries who ultimately participate.

(1) (1864) 10 H. L. C. 656.

(2) (1877) 8 Ch. D. 261, 269.

(3) [1938] A. C. 575, 581.

(4) (1742) 2 Atk. 472.

(5) (1875) L. R. 20 Eq. 255.

(6) [1895] A. C. 186, 195.

(7) 59 L. T. 462, 463.

(8) [1900] 2 Ch. 541.

(9) [1947] 2 All E. R. 162, 166.

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There is a difference between a future vested gift simpliciter and a future vested gift subject to a defeasance. But there is no substantial difference between the latter type of gift and a contingent gift, and it is submitted that they alike carry the intermediate income. Alternatively, if the cases show that there is a difference between future vested but defeasible gifts and contingent gifts, the court should apply the principle of *Bective v. Hodgson* (1), which is that the income follows the capital as an accessory to it. Where there is no immediate disposition of income, the court leans, not in favour of intestacy, but in favour of a construction that will dispose of as much of the estate as possible. A large part of this estate will be undisposed of if the residuary gift does not carry intermediate income. Although the observations of Kay J. in *In re Lindo* (2) may be obiter, they are not more so than those of Jenkins J. in *In re Oliver* (3) in relation to *Weatherall v. Thornburgh* (4). Accordingly it is submitted that *In re Lindo* (2) should be followed rather than *In re Oliver* (3).

Cur. adv. vult.

Nov. 4. ROXBURGH J. [read the following judgment, in which he stated the facts substantially as above set out and continued :] I am asked to determine the destination of a large fund of surplus income which has arisen and will arise between the death of the widow and the death of the survivor of the four named annuitants. I can quickly dispose of two of the claimants.

The defendant, Charles William Gillett, who is an object of the power of appointment, by his counsel contended that the trusts declared in default of appointment do not wholly exhaust the property subject to the power, and that accordingly I ought to imply a gift in favour of the objects of the power of so much of the property as is not expressly disposed of in default of appointment. This I decline to do in the absence of any authority for so doing. The defendant, Joseph Adlington Gillett, who would be entitled to a share of residue if the survivor of the four-named annuitants were now dead asks for immediate payment to himself, though whatever gift is made in his favour is deferred and defeasible. To this I cannot accede.

(1) 10 H. L. C. 656, 665.

(2) 59 L. T. 462, 463.

(3) [1947] 2 All E. R. 162.

(4) 8 Ch. D. 261, 269.

The real question is whether the income in question ought to be accumulated until the expiration of 21 years from the testator's death or until the survivor of the four named annuitants dies (whichever event first happens) for the benefit of those who become entitled to receive the residuary trust fund under the deferred defeasible vested gift, or whether it ought to be paid as it becomes available to the persons entitled on an intestacy.

In *In re Oliver* (1), Jenkins J. said: "The question, 'in substance, is whether the accumulations made during 'the period of 21 years are undisposed of by the will, or 'whether they pass under cl. 7 so as to become divisible 'between the settled shares of the two daughters. I think 'it is right to begin one's consideration of that question 'by remembering what I think is well settled, namely, that 'a gift expressly limited to take effect at a future date does 'not carry the intermediate income, and the gift in cl. 7 is 'a vested gift limited to take effect at a future date, as opposed 'to an immediate gift on a contingent event. If authority 'is needed for the proposition that a gift of that character 'does not carry the intermediate income, it is to be found in 'the authorities cited to me, the first of which was *Weatherall v. Thornburgh* (2)."

Mr. Lindner submits that that pronouncement is against the weight of authority; alternatively, that it is to be confined to an indefeasible future interest, and should not extend to a defeasible future interest, which ought to be treated as belonging to the same category as a contingent interest.

It is true that the industry of counsel, which has been very considerable, has not disclosed any prior statement in terms of the proposition which Jenkins J. treats as settled. Jarman indeed states (7th ed., at p. 1,006) a contrary proposition without qualification. He says: "A residuary bequest which 'is deferred or contingent in its terms carries the income 'which accrues before it vests in possession." Of the cases referred to by Jarman, the only one which appears to relate to a deferred or future gift is *In re Lindo* (3). That case however did relate to such a gift, though it was also contingent, and Kay J. said "a future gift of residue carries with it previous 'income not expressly disposed of." Unfortunately for me, *In re Lindo* (3) was not cited to Jenkins J. I must therefore examine the position anew.

(1) [1947] 2 All E. R. 162, 166. (3) 59 L. T. 462.

(2) 8 Ch. D. 261, 269.

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Mr. Lindner naturally enough lays great emphasis on the well-known passage in the speech of the Lord Chancellor in *Bective v. Hodgson* (1) wherein he says: "Consequently, if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period that the law allows for accumulation, be accumulated and added to principal."

If, says Mr. Lindner, that is the true principle, why should it apply to a contingent gift but not to a deferred gift? I should find this question difficult to answer but for the subsequent course of authority. In many reported cases when (either by the operation of statute or under the terms of the will itself) a trust for accumulation has stopped at the end of 21 years and before a deferred gift was timed to take effect, an intestacy as to intermediate income has resulted. The two most important of them are in fact cited by Jenkins J. and form the basis of his pronouncement. The testator left a gap, and yet intermediate income was not added to the deferred residuary gift. Accordingly the principle laid down in *Bective v. Hodgson* (1) was not applicable to them. After carefully studying the speech of Lord Maugham in *Berry v. Geen* (2), I am convinced that I ought to accept the proposition laid down by Jenkins J. in *In re Oliver* (3), even if by so doing I refuse to follow Kay J. in *In re Lindo* (4). I will give my reasons for this conviction.

It may be straining language and logic to treat a contingent gift as an immediate gift to take effect only upon a certain event, and this is not the way in which the rule is stated in *Bective v. Hodgson* (1). However this may be, it would be impossible (in the absence of a special context) to construe a gift timed to take effect on the happening of an event which must happen sooner or later as a gift of anything before that time, because such a construction is excluded by necessary implication, and accordingly a deferred or future gift could not carry intermediate income unless there were a rule of law that intermediate income not otherwise disposed of passed with the principal as accessory thereto. *Berry v. Geen* (2) shows that no such rule is applicable to future or deferred gifts which are indefeasible. Mr. Lindner, however, points

(1) 10 H. L. C. 656, 665.

(3) [1947] 2 All E. R. 162.

(2) [1938] A. C. 575.

(4) 59 L. T. 462.

out that no case cited to me deals with defeasible future gifts, and he contends that they are so similar to contingent interests that I ought to classify them with contingent interests and not with future interests. It is to be observed, however, that there are important differences between them: a contingent gift fails if the contingency does not happen; a defeasible gift becomes absolute if the condition of defeasance does not happen. I cannot see upon what principle of logic or construction the introduction of a clause of defeasance could make a gift carry intermediate income which otherwise would not do so. Nor am I quite sure why the rule of law applicable to contingent gifts was deemed to be inapplicable to future indefeasible gifts. In these circumstances I feel unable to extend into this new field of defeasible future gifts a rule of law which, though applicable to contingent gifts, is not applicable to indefeasible future gifts. It is indeed strange to find a new field in this area of legal territory. Section 175 of the Law of Property Act, 1925, clearly does not cover this case. This omission is, in my judgment, not inadvertent but intentional.

Undoubtedly words may be found in a will which would be apt to attach intermediate income to a future gift whether defeasible or indefeasible, and Mr. Lindner submitted that apt words are to be found in this case. The gift is of any balance remaining of the residuary trust fund after providing for annuities out of capital or income or both, and at one time I was inclined to hold that such a gift extended to the balance of a mixed fund of capital and past income not required to answer the annuities. But Mr. Rink has convinced me that, as the residuary trust fund is expressly defined in such a manner as to exclude income, I must construe the balance of that fund as meaning so much of the capital thereof as has not been required to answer the annuities. Such a construction cannot aid Mr. Lindner.

Accordingly, in my judgment, there is an intestacy as to the income in question.

Argument was then heard on the question whether the undisposed income should be applied towards the payment of legacies bequeathed by the will.

Rink: Unless a contrary intention be found in the will, the undisposed income must be applied towards the payment of the legacies, according to para. 1 of part II, sch. I

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to The Administration of Estates Act, 1925 (1). No express intention can be found in the will, but it is submitted that the order in the schedule is altered by implication. The testator has disposed of the whole, or probable whole, of the income for an indefinite period, which shows that he did not intend legacies to be paid out of any income, except possibly out of surplus income available in the first year after the death. Where a testator has made express dispositions which make it legally impossible to retain a fund out of the undisposed of income, he must be taken to be varying the provisions in the schedule. *In re Worthington* (2).

ROXBURGH J. : The point which I now have to decide is whether for payment of the legacies resort ought to be had in the first instance to the undisposed of surplus income, if and in so far as it is sufficient for the purpose. Mr. Rink submits that the legacies should not fall on it. He concedes, I think, that they must unless I can find a contrary intention in the will. He concedes, and indeed it is obvious, that there is no express contrary intention in the will. But he submits that I ought to imply a contrary intention. His first submission is that the fact that the testator has disposed of the whole or probably the whole income of the residue for an undefined period shows that he did not want the legacies to be paid out of income except possibly out of any surplus income available in the first year from the testator's death. That is his first submission.

His alternative submission is this : where a testator has made express dispositions which make it legally impossible to retain a fund for or towards meeting pecuniary legacies, he must be taken to be varying the provisions for retention [which are to be found in para. 1 of Part II of sch. I to the Administration of Estates Act, 1925(1)].

I must confess that it seems to me that the answer to both Mr. Rink's submissions is really the same. If anything is clear, I think it is that the testator was not consciously leaving property undisposed of. In those circumstances, I think it difficult to imply from anything that he has said what he would

(1) The Administration of " 1. Property of the deceased Estates Act, 1925, sch. I, Part II, "undisposed of by will, subject "ORDER OF APPLICATION OF "to the retention thereof of a "ASSETS WHERE THE ESTATE "fund sufficient to meet any "IS SOLVENT. "pecuniary legacies."

(2) [1933] Ch. 771

have said if he had been aware that some property was undisposed of. The legacies have in fact been paid, and, of course, the necessary adjustments will have to be made. Accordingly, in my judgment the legacies ought to be paid out of the undisposed property if and so far as it is sufficient for the purpose.

Declarations accordingly.

Solicitors for all parties : *Cunliffe & Airy, agents for Alpin, Hunt & Co., Banbury.*

I. G. R. M.

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TUDOR FURNISHERS LD. v. MONTAGUE & COMPANY
AND FINER PRODUCTION COMPANY LD.

[1948—T. 1477]

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Dec. 6.

Practice—Security for costs—Interpleader issue—Plaintiff company in receivership—Defendant company in compulsory liquidation—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 447—R. S. C. 1883, Or. 65, r. 6.

In an action an order was made in interpleader proceedings directing that an issue should be tried as to the entitlement to a sum in court between the original plaintiff company as plaintiff and a claimant company as defendant. The plaintiff company was in receivership and, on the evidence, in low financial circumstances. The defendant company was in compulsory liquidation. The defendant company took out a summons for an order that the plaintiff company should give security for costs. On the defendant company's offering at the hearing itself to give security,

Held, that the plaintiff company should give security in 50l., conditionally on the payment into court of a like sum by the defendant company.

Judgment of Bankes L.J. in *Maatschappij Voor Fondsenbezit v. Shell Transport and Trading Co.* [1923] 2 K. B. 166, applied and extended.

PROCEDURE SUMMONS.

Tudor Furnishers Ltd., brought an action against Montague & Co., for a sum of money representing the proceeds of sale of a business and of certain leasehold premises. Finer Production Company, Ltd., made a claim respecting the fund in

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question, and in interpleader proceedings an order was made that all proceedings should be stayed as against Montague & Co. on their paying the fund into court, and that an issue should be tried as to the entitlement to the fund between Tudor Furnishers Ltd., as plaintiffs and Finer Productions Ltd., as defendants. That company took out a summons under s. 447 of the Companies Act, 1948 (1), for an order that the plaintiff company should give security for the defendants' costs. The evidence showed that a receiver for the debenture-holders had been appointed of the plaintiff company's assets, and that they were in low financial circumstances. The defendant company were admittedly in compulsory liquidation.

Michael Wheeler for the defendant company. The plaintiffs are in receivership, so that this case is distinguishable from *Universal Aircraft Ltd. v. Hickey* (2), where Morton J. held that the mere existence of a debenture did not justify the making of an order. The fact of receivership and the other uncontradicted evidence as to the low financial condition of the plaintiffs provide ample grounds for making an order.

Quintin Hogg for the plaintiff company. On an interpleader issue of this nature there is not in essence a plaintiff and a defendant: both parties are plaintiffs claiming the sum in court, and the ordinary rule that a defendant may require a plaintiff to give security does not apply. The court must have regard to the substance of the matter: see *Tomlinson v. Land & Finance Corporation Ltd.* (3) and *Belmonte v. Aynard* (4). These cases were considered by Bankes L.J. in *Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co.* (5), where he held that in a case which was substantially an interpleader issue between two foreign corporations no order ought to be made. That judgment covers the present application.

Wheeler: If the court thinks that the judgment of

(1) Companies Act, 1948, s. 447: "Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful

"in his defence, require sufficient security to be given for those costs, and may stay all proceedings until security is given."

(2) Unreported. See Annual Practice (1948 ed.), p. 1530.

(3) (1884) 14 Q. B. D. 539.

(4) (1879) 4 C. P. D. 221, 352.

(5) [1923] 2 K. B. 166.

Bankes L.J. in the *Fondsenbezit* case (1) applies, the defendant company are prepared to offer security.

Hogg: Bankes L. J. did not decide what should be done if one side should offer security, but left that question open. Here no security should be ordered, as the effect might be to prevent a defendant from defending a claim, as both parties may be regarded as defendants; one party might be unable to provide security, and would lose its claim accordingly.

WYNN-PARRY J. In support of the application, Finer Production Company Ltd. have produced evidence which shows that, not merely have Tudor Furnishers Ltd. issued a debenture charging their assets (a circumstance which, by itself, would be insufficient to give the court jurisdiction under s. 447 of the Companies Act, 1948, in view of the unreported decision of Morton J. in *Universal Aircraft Ltd. v. Hickey* (2)), but further that a receiver and manager of the whole, or substantially the whole, of the plaintiffs' property charged by a debenture was appointed in July of this year; and, further, that the financial position of Tudor Furnishers Ltd., is such that it can be concluded, in the words of the section, that it appears by credible testimony that there is reason to believe that Tudor Furnishers, Ltd., would be unable to pay the costs of the defendants Finer Production Company Ltd., if successful in their defence.

On the evidence before me, were the relations between these two companies those of defendants and plaintiffs respectively as they would be in an ordinary action, I should have no hesitation in concluding that a case had been made out for ordering security for costs under s. 447 of the Act. The matter, however, does not end there: in view of the interpleader proceedings, I have, as directed by the authorities, to look at the substance of the matter and not merely at the form in order to see what is the true position in the issue between the parties. I find that their position as regards the point in dispute in the issue is the same: the parties are, in effect, both claimants, and it is a fortuitous circumstance that in the issue Tudor Furnishers Ltd. appear as plaintiffs and Finer Production Company Ltd., as defendants.

In those circumstances, and having regard to *Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Company* (1),

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(1) [1923] 2 K. B. 166.

(2) Unreported. See Annual
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and particularly the judgment of Bankes L.J., in which he reviewed the two earlier authorities of *Tomlinson v. Land and Finance Corporation* (1) and *Belmonte v. Aynard* (2), this is a case in which I ought to exercise my discretion either by directing that no security should be given by either of the parties, the defendants, Finer Production Company Ltd., being themselves in compulsory liquidation, or by declining to order security to be given by Tudor Furnishers Ltd., except on the basis that corresponding security is given by Finer Production Company, Ltd. Bankes L.J. in the course of his judgment said (3) : " The real question, as it seems to me, in this appeal " is whether, having regard to the peculiar circumstances of " the case, the court is not entitled to look at the substance " of the dispute and to say that though the action remains " an action in form it is in substance indistinguishable for the " present purpose from an interpleader proceeding. When " once the defendants admitted liability the whole character " of the proceedings in my opinion changed. Had the " defendants applied under Or. 57, rule 7, for an order that the " Perlak Company should be substituted as defendants instead " of themselves, I can see no reason why the order should not " have been made. Can it make any difference in the juris- " diction of the court that instead of the defendants applying " for such an order the Perlak Company apply for leave to " intervene as defendants ? I think not. Speaking for myself " only, I think that the order of this court allowing the Perlak " Company to intervene was made because the court was of " opinion that after the admission of liability by the defendants " the dispute had resolved itself into a question of whether " the Fondsenbezit Company or the Perlak Company were " entitled to receive the money owing by the defendants to " the plaintiff Deen."

That discloses a position similar to that which has arisen in the present case. Bankes L.J. continued : " As a result " I think that the court has jurisdiction in the present " case, without in the least infringing on the accepted " rule that a foreigner who is made a defendant should " not be ordered to give security for costs, to make an " order requiring the Perlak Company to give security." Apply- ing that to this case, it is therefore clear that I have juris- diction to order Tudor Furnishers Ltd., to give security. The

(1) 14 Q. B. D. 539.

(3) [1923] 2 K. B. 166, 174.

(2) 4 C. P. D. 352.

Lord Justice then proceeded: "But having regard to the fact that the plaintiffs who are applying for the order are themselves in precisely the same position in relation to the dispute as the Perlak Company are and are not offering themselves to give security, I think that the court should exercise its discretion as it did in the case of *Belmonte v. Aynard* (1) and refuse to make any order."

It is clear from the latter passage that a reason which militated in the mind of Bankes L.J. against making any order for security in that case was that the party applying for security did not offer itself to give security. Nobody disputes in this case that the defendants, being in liquidation, could themselves be the object of an application for an order to give security for costs. The question was expressly left open by Bankes L.J., and it is clear from his reasoning that the court in a case such as this has the two alternatives I have mentioned, either to order that security be provided by both, or to make no order against either.

At a late stage of the hearing, Mr. Wheeler on behalf of Finer Production Company, faced with this judgment, offered that his clients should give security to the same amount as might be ordered to be given by Tudor Furnishers Ltd. Mr. Hogg argued that, even in face of that offer, it would not be right to make any order because it might be that, owing to some fortuitous circumstance, one party would be able to provide security for costs while the other would be unable to do so, with the result that an impecunious litigant would be unable to pursue his claim. On the other hand, as the parties are in the same position, I do not myself see why the plaintiffs should be enabled to pursue their claim against the fund, their financial position being as I have stated, without providing some sort of security for the costs which will necessarily be incurred by the defendants. Therefore, I think this a case in which, having regard to the fact that the defendants have offered to provide security for costs, I should make an order against the plaintiffs to give security.

The action, I am told, has only reached the stage when the pleadings have been closed, and discovery has not yet been had. Having regard to that circumstance, in my view only a small sum should be ordered at this stage, and I propose to order that Tudor Furnishers Ltd. should give security for costs in the sum of 50*l.*, and that there should be liberty to renew the

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application at the close of discovery. The order will be conditional on the payment into court of a similar sum by Finer Production Company Ltd.

Order accordingly.

Leave to appeal.

Solicitors: *Sidney Pearlman; Adler & Adler.*

F. R. D.

C. A.

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Nov. 9, 10;
Dec. 2.

NEW ROCK COLLIERY CO. LD. v. MINISTER OF FUEL AND POWER.

[1948 N. 1502]

Evershed M.R.,
Cohen and
Asquith L.JJ.

Mines and minerals—Coal—Nationalization—Computation of interim income—Colliery company making up quarterly accounts—"Last complete accounting period"—Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6, c. 59), s. 22, sub-s. 3 (c).

By s. 19 of the Coal Industry Nationalisation Act, 1946, interim income became payable to nationalized colliery concerns in respect of the period between the primary vesting date and date on which compensation was fully satisfied for the transfer of their interests to the National Coal Board. By s. 22, sub-s. 3 (a), that income was to be calculated by reference to the comparable ascertained revenue of the concern attributable to its activities. By sub-s. 3 (c), the comparable ascertained revenue shall be taken to be (as one of two alternatives) the amount of its profits and gains attributable to its activities "for its last complete accounting period before the first day of July in the year 1946 . . ."

The plaintiff colliery company was entitled to interim income under s. 19. It was its custom to make up its accounts quarterly for the periods ending March 31, June 30, September 30, and December 31. Each quarterly account was audited and entered in the company's ledger. The accounts presented at the general meetings were made up of the four quarterly accounts combined into one account.

Held, that the "last complete accounting period" for the purpose of s. 22, sub-s. 3 (c), was the three months' period ending June 30, 1946. *Jenkins Productions Ltd. v. Inland Revenue Commissioners* (1944) 170 L. T. 292, considered.

Decision of Vaisey J. [1949] Ch. 403, affirmed.

APPEAL from Vaisey J. (1).

The plaintiff company was a colliery company entitled to interim income under s. 19 of the Coal Industry Nationalisa-

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tion Act, 1946, for the period between the primary vesting date and the date on which compensation was fully satisfied for the transfer of its interests to the National Coal Board. Section 22, sub-s. 3, of the Act (1) provides that, for each of the two years beginning with the primary vesting date and the anniversary thereof, a colliery concern is to be entitled to an amount equal to one-half of the comparable ascertained revenue of the concern; and sub-s. 3 (c) provides that the comparable ascertained revenue is to be taken to be either (as the concern may elect) the amount of its profits and gains attributable to the activities of the concern computed on income-tax principles for its last complete accounting period before July 1, 1946, or the average of the amounts of its profits and gains computed for the two complete accounting periods last before July 1, 1944, and July 1, 1945, respectively. The plaintiff company elected to have the computation made on the former of the alternative principles. The company was a small private company incorporated in 1925, of which the two directors were the only shareholders. It had always since its incorporation made up quarterly accounts for the periods ending on March 31, June 30, September 30, and

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(1) The Coal Industry Nationalisation Act, 1946, s. 22, sub-s. 3 :
 "The following provisions of
 "this subsection shall have effect
 "as to the making to colliery
 "concerns of payments in
 "respect of each of the two
 "years beginning with the primary
 "vesting date and the first
 "anniversary thereof respectively,
 "that is to say,—(a) a colliery
 "concern shall be entitled
 "in respect of each of the said
 "two years to a payment of an
 "amount equal to one half of
 "the comparable ascertained
 "revenue of the concern
 "attributable to activities thereof
 "for which the transferred
 "interests thereof were used or
 "owned; (c) for the
 "purposes of paragraph (a) of
 "this subsection a concern's
 " comparable ascertained
 "revenue attributable to activities
 "mentioned in that paragraph

"shall be taken to be either
 "(as the concern may
 "elect) the amount of
 "its profits and gains so
 "attributable, computed on
 "income tax principles subject
 "to such adaptations as may
 "be prescribed, for its last com-
 "plete accounting period before
 "the first day of July in the
 "year nineteen hundred and
 "forty-six, or the average of the
 "amounts of its profits and gains
 "so attributable and computed
 "for its two complete accounting
 "periods last before the first day
 "of July in the years nineteen
 "hundred and forty-four and
 "nineteen hundred and forty-
 "five respectively (any such
 "amounts for any accounting
 "period of more or less than
 "twelve months being adjusted
 "to a twelve months' equivalent
 "thereof)."

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December 31. In the preparation of each quarterly account the company made an inventory and valuation of stock to the accounting date and brought the valuation into account. Each quarterly account was audited as soon as possible after the end of the quarter and written up in the company's private ledger. Royalties payable for the half years ending June 30 and December 31 were estimated for the quarters ending March 31 and September 30. For the purpose of computing the company's income-tax liability the relevant amounts in the four quarterly accounts preceding September 30 were added together. At the company's annual general meeting the only accounts presented to the shareholders were the four quarterly accounts combined into one account.

A summons was taken out by the company asking whether, on the true construction of s. 22, sub-s. 3 (c) of the Act, "the "last complete accounting period before the first day of July "nineteen hundred and forty-six" was : (a) the three months' period ending on June 30, 1946 ; or (b) the twelve months' period ending on June 30, 1946 ; or (c) the twelve months' period ending on September 30, 1945. If alternative (a) were adopted, the annual profits would amount to approximately 21,000*l.*, the profits for the three months ending June 30, 1946, being 5,382*l.* If alternative (b) or (c) were taken as the last complete accounting period, the annual profits would be 13,492*l.* or 2,278*l.* respectively. The argument before Vaisey J. proceeded on the footing that the choice lay between (a) and (c).

Vaisey J. held that the last complete accounting period for the purpose of the sub-section was the three months' period ending on June 30, 1946.

The defendant, the Minister of Fuel and Power, appealed.

Cross K.C. and *Denys Buckley* for the Minister. The Minister's contention is that the "last complete accounting "period" for the purposes of s. 22, sub-s. 3, of the Coal Industry Nationalisation Act, 1946, was the year ending on September 30, 1945. On that date the company's accounts were made up for presentation at its annual general meeting. The company contends that the last complete accounting period is the three months' period ending on June 30, 1946, when a quarterly account was made up to be submitted to the directors. If the company's method is adopted, the second method of calculation laid down in s. 22 is employed, and

the company's profits and gains have to be computed for two complete accounting periods, there would be a hiatus in the accounts as it would be necessary to take the accounts for two quarters ending in June in different years. It is first submitted that "accounting period" in s. 22, sub-s. s. 3 means a period in which an account is submitted to someone. Secondly, in the case of a company the accounting period is the period for which accounts are submitted to the shareholders in general meeting under s. 148 of the Companies Act, 1948, formerly s. 123 of the Companies Act, 1929. In most cases accounts are submitted to the shareholders yearly.

There cannot be two accounting periods for the purposes of the section. The last accounting period cannot be both a yearly and a quarterly period. It is not right to say that a quarterly accounting period is liable to be superseded by a yearly period when the whole year's accounts are made up. In *Jenkins Productions Ltd. v. Inland Revenue Commissioners* (1) Lord Greene M.R. said that where the choice lay between two periods the yearly period should be chosen. These quarterly accounts were merely prepared for the benefit of the directors. For there to be an "accounting period" the account must be prepared pursuant to some obligation. There was no obligation to submit accounts to the directors, but there was an obligation under the Companies Act, 1929, to submit an annual account to the shareholders. Lastly, it is submitted that if there are here two accounting periods, a quarterly and a yearly period, the period chosen should be not the quarterly period but the annual period.

In the absence of any special context the phrase "accounting period" means the period in respect of which accounts are made up under any statute imposing the obligation to submit accounts, and a quarterly period is therefore not the accounting period. If, however, the court is against this view and thinks that the accounting period is just that period for which accounts happen to be made up, *Jenkins Productions Ltd. v. Inland Revenue Commissioners* (2) shows that the twelve months' period is to be preferred.

[EVERSHED M.R. : Section 22, sub-s. 3 (c) provides that the profits and gains are to be computed on income-tax principles.]

That is a further reason for not having regard to the last quarterly accounts : see Konstam on Income Tax (10th ed.), p. 142. Can it be fair to say that there is a complete accounting

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(1) (1944) 170 L. T. 292, 293, 294. (2) Ibid. 292.

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period in a quarter when the quarterly accounts are summed up into an annual period? The quarterly accounts are only taken by the company to facilitate the ultimate work of making up the annual account which is submitted to the annual general meeting of shareholders.

Russell K.C. and *W. M. Hunt* for the colliery company. The purpose of the short accounting period was to make the figures more clearly available to show if there has been any loss. The period available for the records of a company may be twelve months or less, it being open to each company to decide how it will keep its records. It has been suggested that the purpose of the words at the end of sub-s. 3 (c) was to fix the twelve months' accounting period. That is not so, but the words are put in because what is being looked for is the comparable one year's income ascertained from a smaller or larger accounting period. It is clearly left to the company to determine its period of accounts. The accounts presented at the shareholders' general meeting will be for the period of a year, but those will be easily made up for the quarterly accounts.

[EVERSHED M.R. : I am not satisfied that the last preceding quarterly account is "the last complete accounting period" before July 1, 1946.]

A complete accounting period can only mean a period for which the company prepares a complete statement of account. Moreover, the quarterly accounts are fundamental to all other periods. The yearly accounts are merely calculated mathematically from the quarterly accounts. The quarterly accounts were the only ones for which there were separate audits. The onus is on the other side to show that the last quarterly account was not a complete accounting period. If sub-s. 3 (c) is postulating only one type of accounting period, it must in this case be the quarterly accounts. COHEN L.J. has put the point that the profits and gains are to be calculated on income-tax principles, but that only shows that you must find the last complete accounting period and then look at the profits for that period for income-tax purposes.

Cross K.C. replied.

Cur. adv. vult.

Dec. 2. The following judgments were read :

EVERSHED M.R. : This appeal raises the short question of the effect of s. 22 of the Coal Industry Nationalisation Act,

1946, and particularly of the phrase in sub-s. (3) (c) of that section "its last complete accounting period," upon the respondent company. The purpose of the section is to provide for payment to colliery concerns (of which the plaintiff company is one) in respect of their interests transferred under the Act (in this case the company's whole business and undertaking) of income payments for the two years next following the vesting date, viz. July 1, 1946. The payment so to be made for each year is by para. (a) of s. 22, sub-s. 3 of the Act specified as "one half of the comparable ascertained revenue" of the concern. Paragraph (c) of the sub-section, on which the whole matter turns, prescribes the way in which the comparable ascertained revenue is to be determined. The paragraph is in the following terms: [his Lordship read the paragraph.] It will be observed that a choice of two alternatives is given by the paragraph. In the present case, the plaintiff company chose the first alternative; and it has claimed to have the relevant calculation made by reference to the quarterly period to June 30, 1946, as the last complete period prior to July 1, 1946, in respect of which, in accordance with the company's regular business practice for very many years, revenue or profit and loss accounts were, in fact, made up and examined and verified by its auditors. The Minister of Fuel and Power contends, on the other hand, that, since this quarterly accounting was done merely for the internal convenience of the company and the information of its directors, and was not undertaken pursuant to any statutory or other obligation imposed on the company, and also was not laid before its members in general meeting, the quarterly period in question cannot properly be regarded as the company's "last "accounting period" within the meaning of the section; but that by the phrase quoted Parliament must have intended to refer (so far as relevant to the present case) to the last period for which the company's accounts, in the ordinary business acceptance of the term, were prepared, that is, the yearly period to September 30, 1945, for which the company's annual accounts were made up for presentation to the company's annual general meeting pursuant to its obligation under s. 123 of the Companies Act, 1929 (1). On the facts of the case as they have turned out, the latter view, if correct, will produce results very much less advantageous to the company than the former.

(1) Now Companies Act, 1948, s. 148.

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As will have appeared, the whole question turns on the proper interpretation to be given to the few words "its last "complete accounting period." No further instruction is given in the definition section or elsewhere in the Act as to the meaning of the phrase; nor does it appear to have any special or established significance. It is therefore necessary to apply to the words, as ordinary English words, the ordinary principle of construction adopted in the courts and to ask and answer the question: what, on the facts of the case as proved by properly admissible evidence, was the last accounting period of this company? I have posed the question in this form since it is, I think, particularly important in this case to bear in mind that the function of the court is in general to confine itself to the particular subject matter presented to it, and not (save to the extent necessary for the determination of the case before it) to lay down general principles for application to other cases and other circumstances.

In the present case the evidence before the court, and the only evidence, consists of two affidavits sworn on the company's behalf, one by one Thomas, a partner in the firm who have acted for many years as the company's auditors, and the other by the company's secretary, together with a letter written—no doubt for the purposes of the action—to Thomas' firm by His Majesty's Inspector of Taxes in November, 1948. No books or accounts of the company have been in evidence before the court, nor have its memorandum and articles of association been exhibited. It was stated and agreed by counsel (though not proved) that the company had at all material times only two shareholders who were also its directors.

The relevant facts as to the company's practice in regard to its accounts are stated in the first five sub-paragraphs of para. 6 of Thomas' affidavit. All these sub-paragraphs are important for present purposes, but it will be sufficient in this judgment to read only sub-paras (1), (3) and (5): "(1) Since "the incorporation of the company on September 17, 1925, "its accounts have always been made up and produced "quarterly for the periods ending on March 31, June 30, "September 30 and December 31, and a balance sheet was "prepared at each of those dates . . . (3). Each quarterly "account has been audited as soon as possible after the end "of the quarter, and written up in the company's private ledger. "For the purposes of the said quarterly accounts royalties, "which were in fact payable for the half years ending June 30

“ and December 31, were estimated for the quarters ending
 “ March 31 and September 30 (5). The accounts
 “ presented to the shareholders of the company at the annual
 “ general meeting of the company were the four quarterly
 “ accounts combined into one account in respect of the year
 “ ending September 30. It was to the balance sheet made
 “ at September 30 and presented at the annual general meeting
 “ that the auditor’s certificate required under the Companies’
 “ Act, 1949, was appended. These were the only accounts
 “ presented to the shareholders at the annual general meeting
 “ of the company.” In his letter, to which I have earlier
 referred, the inspector of taxes stated: “ As far back as
 “ I can trace, this company always produced, for purposes
 “ of arriving at its taxation liabilities, quarterly accounts
 “ (including detailed balance sheets) up to and including the
 “ income-tax year 1938–39. For that year you forwarded
 “ as usual four quarterly accounts ended December 31, 1937.”
 Then, after referring to a recorded note in his possession of
 a conversation with Thomas, when the latter “ explained
 “ to me that the company had always made up its accounts
 “ quarterly,” the inspector ended his letter as follows: “ Since
 “ that time (i.e. for the year to September 30, 1938, and follow-
 “ ing years) a single account covering one year has been
 “ produced to me. It seems quite clear, however, that the
 “ company has still continued to prepare its accounts quarterly.
 “ All supporting schedules of information produced to me
 “ have invariably been prepared on a quarterly basis.”
 Finally, the secretary in his affidavit states that, prior to the
 transfer of its business under the Act of 1946, the company
 made half-yearly returns up to June 30 and December 31
 to the Somerset district colliery owners’ association for the
 purpose of district wages ascertainment and also made annual
 returns to the Board of Trade (afterwards the Ministry of
 Fuel and Power) made up to December 31, and that in each
 case the returns were “ an aggregation ” of the figures in the
 appropriate quarterly accounts.

As previously appears, the company’s financial year at all
 material times ended on September 30. On this evidence it is,
 in my judgment, clear beyond reasonable doubt that this
 company has as a matter of business practice for very many
 years made up its accounts, in the true and proper sense of
 that term, quarterly. No doubt, having regard to the various
 returns it had to make for income-tax and other purposes, it

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was convenient so to do ; so that on these occasions it had only to make the appropriate compilations or aggregations. In any event it is plain that the professional inspection and verification of the company's books was undertaken quarterly and that no separate audit was made, for example, for the purposes of the annual accounts to be laid before the general meeting for income-tax purposes. It is true that the auditors' certificate pursuant to the Companies Act was annexed only to the annual accounts ; but I cannot see that for present purposes that fact can be of material assistance. The terms of the certificate could not be said to suggest that the information given to the auditors had been given otherwise than in the course of taking the quarterly accounts.

In these circumstances, Mr. Russell suggested that, whatever might be or have been the position on other dates, the last complete accounting period prior to July 1, 1946, was undoubtedly the quarterly period which ended on June 30, 1946 ; so that, if the company's financial year was also an accounting period, nevertheless the quarter to June 30, 1946, was later in date than the year to September 30, 1945. I agree with Vaisey J.'s conclusion that the quarter to June 30, 1946, was the company's last complete accounting period before July 1, 1946. I do not, however, think it right or satisfactory to decide the present case solely on the narrow ground suggested by Mr. Russell. Though it is true that the company's financial year is not, as it were, directly in competition with the quarterly period to June 30, 1946, as it would have been had the financial year also ended on June 30, nevertheless, if (as the minister has contended) the section, upon its true interpretation, must be taken in the case of this company to point to an annual accounting period, then the year to September 30, 1945, was the last such period and ought *prima facie* to take precedence for present purposes over the quarterly period to June 30 ; and if both the financial year and the quarters can properly be called accounting periods it is, I think, proper to state my conclusion why the period, which, in this case, I think to be the relevant period, qualifies as such—that is, whether it does so by virtue only of chronology or because of its characteristics other than those of date.

I turn, therefore, to the language of the paragraph in the sub-section. No assistance, to my mind, can be derived from the word "complete." It was suggested on the Minister's part that the quarterly accounts should be regarded as, at

most, "interim" accounts and, therefore, not "complete" within the meaning of the paragraph; but I cannot accept the suggestion. The adjective "complete" is related to the noun "period" and must, therefore, in my judgment, mean unbroken or unfinished. A significance by way of contrast to "interim" would only be possible if the word had been used to qualify not the period but the accounts. The main burden of the Minister's case hinged on the word "accounting," and it was urged that the use of this word necessarily imported the notion of an obligation—statutory or contractual—to account to someone. In the case of a partnership (which the Act must clearly be taken to have contemplated as one type of "concern") the "accounting" would be by the partners to each other under the common provision to that effect found in articles of partnership. But in the case of a company subject to the Companies Act the obvious obligation (it is said) is that imposed by statute—the obligation to account once, at least, in every year to the shareholders in general meeting. Alternatively, it was argued—particularly in the light of the immediately preceding reference to "income tax principles"—that the duty to account contemplated was the duty in respect of income tax; with the same practical result that the company's yearly accounting period must alone have been intended.

I am unable to accept either of these contentions. It is to be observed that the language of the paragraph appears to contemplate the making of a new account rather than a reference to an already existing account. The comparable ascertained revenue is (in the present case) to be taken to be "the amount of its profits and gains . . . computed "on income-tax principles subject to such adaptations as "may be prescribed" It follows, in my judgment, that there is a distinction between the principles on which the account is to be taken (which may be modified by statutory instrument) and the period in respect of which such account will be made up. The principles on which the account is to be taken cannot, to my mind, be governed or affected by the period which they cover. No doubt the existing accounts, already verified, will in practice form the basis of the computation which the paragraph requires; but it does not, to my mind, follow that the period to be selected for the purposes specified by the paragraph should be determined by reference to the purposes for which periodical accounts have been, in fact, made up.

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Much reliance was placed by the Minister upon the judgment of Lord Greene M.R., in *Jenkins Productions Ltd. v. Inland Revenue Commissioners* (1). I agree with Vaisey J. that this case was decided upon a statute wholly different in its language from that which we have to construe ; and I confess that, for my part, I derive little assistance towards the solution of the present problem from that decision. The question in that case was whether the appellant company in fact “made up” accounts for a twelve monthly period within the meaning of the Finance Act, 1939 (imposing excess profits tax). It is true that in that case it was proved that the appellant company in fact regularly caused accounts of its business transactions to be prepared and audited for six monthly periods, and that the annual accounts laid before the shareholders in general meeting were a compilation or aggregation of the two relevant half-yearly accounts. The real question, therefore, was not what was the company’s “accounting period,” but (though it might well be said to have “made up” accounts for periods of six months) whether nevertheless it could truly be said that it in fact “made up” accounts for periods of twelve months. To this question the court gave an affirmative answer ; but in my judgment the answer neither involved any denial that the company also “made up” six monthly accounts nor suggested any answer to the question (which was quite irrelevant for the decision and was not raised or argued in the case) what was the company’s “last accounting period.” The Master of the Rolls, however, having stated his answer to the question posed on the lines indicated above, proceeded to add the following (2) : “Here you have a company which, in fact, did prepare two different sets of accounts : “one a six-monthly account prepared for the convenience “of the directors ; the other a twelve-monthly account “prepared for the information of the shareholders. That “twelve-monthly account is one which has certain characteristics. First of all, it is to be submitted to the shareholders “who are entitled to approve or disapprove it. Therefore, “in that sense, it is a final account in a way in which the “accounts produced to the directors for the six months were “not final accounts at all. Secondly, the accounts so submitted to the shareholders were submitted in pursuance “of the statutory obligation to submit accounts. It seems “to me, bearing these two considerations in mind, that the

(1) 170 L. T. 292.

(2) Ibid. 294.

" yearly accounts are primarily the more important of the two
 " sets of accounts which this company in fact got out. Applying
 " the language of this section to that state of affairs,
 " which of these two sets of accounts is properly to be described
 " as ' the accounts of the trade or business ' ? Surely there
 " can only be one answer to that question. The accounts
 " are the important final accounts. It seems to me that
 " these words have to be construed in the light of the well-
 " known practice of companies to have a financial period.
 " A company's financial period is commonly twelve months ;
 " and accounts are got out in reference to that financial period.
 " When the paragraph speaks of the accounts being ' made up,'
 " it surely must mean the accounts which are the accounts
 " for the purposes of the company's financial unit of time."

It is on this passage that the Minister most strongly
 relies, and most particularly upon the last sentence that I have
 quoted. Having regard to the answer which the Master of
 the Rolls had already given to the question raised in the case,
 the passage quoted must, in my judgment, be regarded as
 " obiter "—though none the less deserving of great weight.
 The Master of the Rolls was, as I follow his judgment, finding
 in the circumstances to which, in the passage quoted, he refers,
 corroboration for his view that the appellant company in
 a real sense of the term in fact " made up " its accounts for
 twelve-monthly periods. Mr. Russell has criticized the
 reference to the power of the shareholders to " approve or
 " disapprove " the accounts laid before them ; and he has
 pointed out that disapproval would not, in fact, invalidate
 the accounts or disqualify them as " the company's accounts."
 For present purposes, however, I do not think such criticism
 assists the present problem one way or another. I am ready
 to assume that in the present case the plaintiff company
 can properly be said to have " made up " its accounts when
 the necessary aggregation or compilation was made for the
 purpose of the annual general meeting ; as I am also strongly
 inclined to think that it can be said to have " made them up "
 half-yearly for the purpose of wages ascertainment and annually
 to December 31 for the purpose of tendering returns to the
 Board of Trade or the Ministry of Fuel and Power. Whatever
 may have been the plaintiff company's " financial unit of
 " time " generally or for particular purposes, the question in
 this appeal remains : what was its last complete accounting
 period before July 1, 1946 ?

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I can well understand that in other cases and on other facts, where a company or other "colliery concern" was shown to have "accounted" both annually and in respect of shorter periods, it might be held that the concern had two (or more) accounting periods and that for the purposes of s. 22 of the 1946 Act the "last complete accounting period" before the vesting date was that period (twelve monthly or other) which, in fact, last ended before that date; or (because two such periods were directly in competition for qualification under sub-s. 2 (c) or otherwise) that the accounts taken in respect of the shorter period ought to be regarded as subsidiary in character, so that the twelve-monthly period ought to be accorded primacy. But in the present case, as I have attempted to show, the facts proved in evidence seem to me clearly to establish the truth of Thomas' statement to the inspector of taxes—"the company had always made up its "accounts quarterly."

I ought also to refer to the Minister's argument based on the second alternative offered to the colliery concern by the relevant paragraph. If the view of the judge is correct, then it is pointed out that, had the plaintiff company chosen the second alternative, the figures would have been calculated on the somewhat artificial basis of two quarterly accounts separated by a gap of nine months. This is undoubtedly true: but it is not, to my mind, sufficient to compel us to give to the phrase "last accounting period" a strained or special significance. The statutes which were subject to consideration in the *Jenkins* case (1) show at least that, if Parliament had desired or intended in the case of limited companies or otherwise to give a preference to twelve-monthly periods of accounting, there were available precedents in the Finance Acts for doing so. The choice was made of what appears to be a novel phrase "last accounting period." And if the purpose of the section is considered, there are at least reasonable grounds for the choice. By s. 19 of the Act the undertakings of the colliery concerns had become vested in the State; but it was apparent that the fixing of the global amount of capital compensation and (still more) its apportionment among the various participants would take a considerable time. It was, therefore, decided to provide, in addition to the capital compensation, for payment of a further sum by way of compensation for the loss of revenue experienced during the two years

following the vesting date at a rate (speaking broadly) of 50 per cent. of the income which the concerns were, by the effect of the Act, prevented from earning. In such circumstances, it is, at least, not surprising that, for the purpose of calculating the income compensation, the period taken should be that which ended as near as possible to the vesting date; for the figures for that period might fairly be supposed to have indicated, as nearly as practicable, what the fortunes of the concerns would have been, apart from nationalization. And if, in any case, as a result of temporary chances, this latest period might operate unfairly on a concern, it was given the option of taking the average of the corresponding periods next before July 1, 1944, and July 1, 1945. I should add that in any event the second alternative has not been expressed so as to cover all possible cases, for, if a concern, the accounting period for which had at all times been admittedly yearly, had chosen to alter the date to which the (annual) accounts were made up, it might well have happened that there was no complete accounting period after July 1, 1944, and before July 1, 1945; so that in such case the second alternative would not be available at all.

I have left until last the effect of the final parenthesis in the paragraph—" (any such amount for any accounting "period of more or less than twelve months being adjusted "to a twelve months' equivalent thereof),"—which Vaisey J. regarded as decisive. I am myself disposed to place less emphasis upon these words than did the judge; for it is, I think, true to say that even if in the case of the ordinary trading company the period indicated is the normal "financial" "unit" of twelve months, sensible effect can be given to the parenthesis, which on this view would cover the case where at the material date the company had changed its accounting year so that its last accounting period was, in fact, a period of less or more than twelve months. Nevertheless, I agree with the judge in thinking that the parenthesis more naturally supports the view of the plaintiff company than that of the Minister. As the Minister's counsel have rightly emphasized, the colliery concerns affected might well be not only limited companies but partnerships or businesses carried on by individuals. And in the latter instances, whatever might have been their practice as regards income-tax, their "accounting periods" might have been some periods other than yearly; for example, under partnership articles

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the duty of accounting is not uncommonly imposed half-yearly. Bearing such cases in mind, it seems to me that Parliament chose a form of words of universal application and intended to cover each and every concern in accordance with the facts proved as to its particular established business practice.

Having regard to the importance of the case, and out of respect for the arguments submitted to us, I have dealt at length with the various points submitted for our consideration. But in the result I find myself in agreement with the conclusion of Vaisey J. as expressed by him at the end of his judgment (1). "It cannot be disputed on the evidence that the company made up its accounts quarterly. There is no evidence that the combined account was anything but the most formal combination of the four preceding quarterly accounts. Although it seems to make a great deal of difference in this case, it might, of course, have operated the other way. In any case, this company with no ulterior object in view, but merely as a matter of perfectly legitimate arrangement of its own private affairs, has for years made up its accounts, had them audited, and had them entered in its ledger, on a quarterly basis."

For these reasons I think the appeal should be dismissed.

COHEN L.J.: I am of the same opinion. As the Master of the Rolls has said, the question before us is the short one of the meaning of the expression "its last complete accounting period before July 1, 1946" in sub-s. 3 (c) of s. 22 of the Coal Industry Nationalisation Act, 1946. Vaisey J. has held that, so far as the New Rock Colliery Co. Ltd. is concerned, it is the quarterly period ending June 30, 1946. He has based his conclusion largely on the words "(any such amount for any accounting period of more or less than twelve months being adjusted to a twelve months' equivalent thereof)" at the end of para. (c). I do not myself attach the same importance as he did to those words, as I think that they might have been inserted to cover the contingency, for instance, of a company having altered the date of its financial year in the year preceding July 1, 1946, and thus having made up its accounts on that occasion only for a period of more or less than twelve months. None the less, for the reasons I will state, I think that Vaisey J. came to the right conclusion on the evidence before the court.

(1) [1949] Ch. 403, 408.

What grounds did Mr. Cross put forward to induce us to reach a different conclusion? His first and main contention was that the expression "its last accounting period" connoted that the company had accounts made up for the purpose of enabling it to account to someone whom I will refer to for the time being as "X." I am unable to accept this argument. In the first place I do not think that the construction suggested by Mr. Cross accords with the natural meaning of the words used in the section. In the second place, who is "X"? Mr. Cross first suggested that "X" is the company in general meeting; but the owner of a colliery concern may be an individual, and Mr. Cross was unable to make any suggestion as to who would, in that event, be the understudy for the role of "X." Alternatively, he suggested that "X" might be the Commissioners of Inland Revenue to whom every trader, individual, partnership or limited company, has to make a return. But the difficulty arises that under the relevant section (s. 34 of the Finance Act, 1926) the accounting period for income-tax purposes would necessarily be twelve months, and it would be impossible, therefore, to attribute any meaning to the concluding words of para. (c) of sub-s. 3 of s. 22. I think that Mr. Russell was right when he said that the expression "its last complete accounting period", on the natural construction of the words, meant only the last period in respect of which the owner of the colliery concern chose to make up its accounts, in other words, to borrow the phrase used by Lord Greene M.R. in *Jenkins Productions Ltd. v. Inland Revenue Commissioners* (1), "the period which the company chooses as its 'financial unit' 'of time.'" This is, in each case, a question of fact. In the case of a partnership, it may well be that in the normal case the financial unit of time will be the period fixed by the articles of partnership as the period to be covered by each partnership account. In the case of an individual it may well be that the only traceable financial unit of time will be the year selected as the basis of the income-tax assessment. In the case of a company, bearing in mind the relevant provisions of the Companies Acts and the common-form articles (see, for example, Palmer's Company Precedents, vol. I., 15th ed., p. 728), it may well be that normally the financial unit of time will be twelve months, that being the usual period covered by the accounts laid before the annual general meeting. But it must be remembered that the Act does not require the company

(1) 170 L. T. 292.

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to present its accounts to a general meeting only once a year. There is nothing in s. 123 of the Act of 1929 or in the corresponding section of the Act of 1948 preventing the company from presenting accounts half-yearly or more often to a general meeting. Nor can I see anything to prevent a company from selecting any period it chooses as its financial unit of time on the basis of which accounts are prepared for other purposes. In the present case, on the evidence before him, I think that Vaisey J. was compelled to conclude that the company's financial unit of time was the quarter; that therefore its profits and gains had to be ascertained for the last complete quarter before July 1, 1946, viz. that ending on June 30, 1946; and that the fact that, for the various purposes to which the Master of the Rolls referred, including the preparation of an account covering a twelve months' period for presentation to the annual general meeting, two or more quarterly accounts were aggregated was nihil ad rem and did not prevent the quarterly period from being the last complete accounting period before July 1, 1946, of this company. For these reasons I agree that the appeal should be dismissed.

EVERSHED M.R. : I am authorized by Asquith L.J. to say that he agrees with the judgments which have been delivered.

*Appeal dismissed.
Leave to appeal.*

Solicitors : *Treasury Solicitor ; Church, Adams, Tatham & Co. for Burges, Salmon & Co., Bristol.*

H. C. G.

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undertaking by tenants not to prove in bankruptcy for damages awarded—Action by trustee for rent due before and after bankruptcy—Claim to set-off damages—Leave obtained for further defence that trustee could only recover standard rent under the Rent Restriction Acts.

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The debtor, who had mortgaged her private hotel to a building society, subsequently granted a lease without the society's consent to the defendants for a term of 7 years at the rent of 500*l.* a year. At the same time and as part of the same oral agreement, the defendants purchased the goodwill and furniture for 5,000*l.*, of which they paid 2,000*l.*, giving a bill of sale on the furniture for the balance. Finding, on taking possession, that the debtor had been guilty of fraudulent misrepresentation, the defendants brought an action in the King's Bench Division for damages and to have the bill of sale set aside. They paid only the first quarter's rent. When two quarters' rent was in arrear the debtor was adjudicated a bankrupt. Later the tenants obtained judgment against her for damages (afterwards assessed at over 5,000*l.*), and the bill of sale was set aside. In that action the trustee in bankruptcy obtained a stay, but, after he had brought this action against the defendants for five quarters' rent, the defendants obtained a removal of the stay on undertaking not to prove in the bankruptcy for the damages awarded. The building society began foreclosure proceedings by originating summons in which they did not recognize the lease. After the defendants had put in their defence in this action, the society amended their proceedings and claimed only possession against the defendants whom they did not acknowledge or treat as tenants. That action could not then succeed as it was not brought by writ. The defendants' original defences in this action were (1.) that they were entitled to set off the damages for fraud, and (2.) that if ordered to pay the arrears of rent they risked being made to pay the rent again to the mortgagees. In the Court of Appeal they were allowed to plead, by way of additional defence, that the rent in 1939 was 140*l.* a year which, as being the standard rent under the Rent Restriction Acts, could alone be recovered, and to lead evidence in support of that additional defence.

Held, (1.) that the defendants, having undertaken not to prove in the bankruptcy, could not rely on set-off as an answer to the claim for the first two quarters' rent; (2.) that, as regards the three quarters' rent which became payable after the beginning of the bankruptcy, there was no mutuality entitling the defendants to set off the sum due to them from the debtor against the trustee's claim; (3.) that in view of the Court of Appeal's decision in *Dudley and District Benefit Building Society v. Emerson* [1949] Ch. 707, the mortgagees could not recover rent against the defendants; and (4.) that on the evidence the standard rent was 140*l.* a year, and that this rent was alone recoverable seeing that the premises were let to the defendants under a lease permitting their user as a dwelling-house; the excess (90*l.*) of the quarter's

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rent actually paid could be set off against the two quarters' standard rent (aggregating 70*l.*) which became due before the bankruptcy; and that the amount recoverable in the action was reduced to 105*l.* in respect of the remaining three quarters' standard rent.

Decision of Harman J. [1949] Ch. 588, with regard to the defences set up at the trial approved.

APPEAL from Harman J. (1).

In April, 1947, the defendants, one Madders and his wife, orally agreed to buy from a Mrs. Kitchen for 5,000*l.* the goodwill and certain contents of a private hotel, and to take a lease of it from her. By a lease dated May 9, 1947, Mrs. Kitchen demised the premises to the defendants for a term of seven years at a yearly rent of 500*l.* payable quarterly. In respect of the sum of 5,000*l.* due for goodwill and furniture, the defendants paid 2,000*l.* in cash to Mrs. Kitchen and gave her a bill of sale on the furniture for the balance of 3,000*l.* Mrs. Kitchen had previously mortgaged the premises to a building society, and, in breach of the terms of the mortgage, she did not obtain the society's consent to the grant of the lease. After going into possession the defendants found that Mrs. Kitchen had been guilty of fraudulent misrepresentation, and they issued a writ in the King's Bench Division affirming the contract and claiming damages for the fraud. They paid the first quarter's rent 125*l.*, but no more. On December 3, 1947, when two quarters' rent was already owing, Mrs. Kitchen (hereafter called the debtor) was adjudicated a bankrupt. On motion for judgment in default of defence in the King's Bench action, the court gave judgment against the debtor for damages to be assessed, and set aside the bill of sale. In August, 1948, the trustee in bankruptcy of the debtor obtained a stay in those proceedings and the defendants took out a summons for removal of the stay. Immediately after the first hearing of that summons, the trustee issued the writ in this action claiming the two quarters' rent due before the bankruptcy and the three quarters' rent that had since become due, amounting in all to 625*l.* On October 15, 1948, the stay in the King's Bench action was removed upon the defendants' undertaking by their counsel not to prove in the bankruptcy for the damages awarded in that action.

On October 25, 1948, the mortgagees began proceedings

(1) [1949] Ch. 588.

by originating summons for foreclosure in which they recognized neither the lease of May, 1947, nor the defendants as tenants. On November 4 the district registrar assessed the damages for the debtor's fraud at 5,560*l.* 11*s.* 5*d.*, and on February 8, 1949, after the defendants had delivered their defence in this action, the mortgagees amended their proceedings by asking for possession of the hotel, all other claims being struck out. That claim for possession was directed against the defendants treating them as strangers and not tenants, and it could not then succeed because such an action for possession had to be begun by writ also, not by originating summons.

In the present action the defendants claimed to set off the damages awarded in respect of the debtor's fraud against the trustee in bankruptcy's claim for 625*l.* for five quarters' rent. They also contended that they were in danger of having to pay the rent twice because the trustee was claiming through the debtor who, being a mortgagor, might at any time be displaced by the mortgagees.

Harman J. held that there could be no set-off as to the three quarters' post-bankruptcy rent since they only became due to the trustee; nor as to the two quarters' pre-bankruptcy rent, by reason of the defendants undertaking not to prove in the bankruptcy for the damages awarded in the King's Bench action. He also held that the building society had not intervened to such an extent as to require the defendants to be protected against having to pay rent twice.

The defendants appealed, and in the Court of Appeal they were allowed to supplement their defences and lead further evidence as below stated.

Michael Browne for the defendants. Two defences were raised in the court below (1.) that of set-off, and (2.) that if the trustee succeeded the defendants might find themselves at risk of having to pay double rent—to the debtor's trustee, and to the building society as mortgagees. As to the first of these, the claim to set-off rests simply on an amount being due from the debtor in excess of the rent being claimed by the trustee in bankruptcy. The only right the defendants gave up in order to obtain a release of the stay in the King's Bench action was the right to prove for the damages awarded. That amounted only to giving up a weapon of offence consisting of coming into the bankruptcy and proving. The weapon of defence consisting of the right of set-off remains: *Sovereign Life*

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Assurance Co. v. Dodd (1). Unless that right prevails in the bankruptcy, it will be valid only as to the first two quarters' rent becoming due before the bankruptcy: see, however, as to the right to set-off against his trustee a claim for unliquidated damages for a debtor's fraud, *Jack v. Kipping* (2). As to the claim for set-off against the three quarters' rent becoming payable after the bankruptcy, *Alloway v. Steere* (3) was relied on by the trustee, but that case is distinguishable. There having been rival claims before the adjudication, amounts subsequently becoming due on either side can be brought into account. It is to be remembered also that the judgment for damages was given after the adjudication. There was an equity against the debtor, and when the trustee took his place he could be in no better position. *Lawrence v. Hayes* (4) is in favour of the defendants though it must be admitted that *Stoddart v. Union Trust Ltd.* (5) is somewhat against them.

Secondly, the question is whether the defendants might be in danger of having to pay rent twice because the trustee's claim is through the debtor, a mortgagor who might at any time be displaced by the mortgagee building society. It is to be remembered that the lease was granted after the mortgage had been made and that granting the lease without the mortgagee's consent was in breach of the mortgagor's covenant in the mortgage. That default gave the mortgagee a number of rights, including foreclosure for which the summons was taken out by which it was sought to obtain possession against the defendants as strangers in occupation. It was then held that the proceedings must be by writ, but it has since been held in *Alliance Building Society v. Varma* (6) that such a claim could be made by adjourned summons,

[Sir R. EVERSHED M.R. : Do you still say that the mortgagee could recover arrears of rent?]

It would seem not in view of *Dudley & District Benefit Building Society v. Emerson* (7), and a decision of this court of later date. But a claim might be made for mesne profits. If sued by the mortgagee for possession, the defendants could not set up the lease. It must be admitted, however, that in view of the change in the law, it is most difficult to maintain the second point. The trustee, however, could not, as claiming

(1) [1892] 2 Q. B. 573.

(2) (1882) 9 Q. B. D. 113.

(3) (1882) 10 Q. B. D. 22.

(4) [1927] 2 K. B. 111.

(5) [1912] 1 K. B. 181, 188.

(6) [1949] Ch. 724.

(7) [1949] Ch. 707.

through the debtor, sue for rent in exercise of the power conferred by s. 98 of the Law of Property Act, 1925, seeing that the mortgagee had in fact given notice of his intention to take possession.

Lastly, if the court comes to conclusion that the defendants have put themselves in a worse position by the course they have adopted, I ask the court to take that into account and to say that the trustee in bankruptcy, as an officer of court, ought not to take advantage of the defendants' mistakes. [*Ocean, Accident & Guarantee Corporation Ltd. v. Ilford Gas Co.* (1) and *In re Wigzell* (2) referred to.]

Aronson K.C. was called on to argue only on the question whether the defendants could set off against the first two quarters' rent.

Aronson K.C. The attention of the court should first be called to *Moss v. Gallimore* (3) and the note to that case, and to *Wilton v. Dunn* (4) there referred to. These show that a mere motion by a mortgagee is not a defence to the mortgagor's action against his tenant.

Turning to the point on which argument is requested, it is assumed that the court is already satisfied that there is no set-off in respect of rent accruing due after the bankruptcy. As to the first two quarters' rent which became payable before the bankruptcy, the defendants would have a good claim to set-off but for the undertaking not to prove in the bankruptcy: *Jack v. Kipping* (5). That undertaking, likewise, prevents the defendants from setting off, seeing that the defendants are debarred from proving or claiming to prove the debt. That means that there is no provable debt, and that being so there can be no right of set-off under s. 31 of the Bankruptcy Act, 1914.

Michael Browne replied.

Before this appeal was heard the defendants had obtained leave to amend the defence by setting up an additional defence, viz., that the premises were let in 1939 at a reduced rent which was accordingly the standard rent under the Rent Restriction Acts; and to lead evidence in support of this. The material facts are stated in the judgment of Cohen L.J.

(1) [1905] 2 K. B. 493.

(4) (1851) 17 Q. B. 294.

(2) [1921] 2 K. B. 835.

(5) 9 Q. B. D. 113.

(3) (1779) 1 Doug. 279;

1 Sm. L. C. 13th ed. 565.

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C. A. EVERSHED M.R. : I will ask Cohen L.J. to deliver the first judgment.

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COHEN L.J. : In this case the plaintiff, a trustee of the property of a bankrupt, Mrs. Hilda Kitchen, sues the defendants for five quarters of rent due under an agreement of lease of May 9, 1947. The first two quarters accrued due before the debtor's bankruptcy ; the last three fell due after that date. There was no dispute as to the liability for the rent, but the defendants set up originally two defences, and it was on those two defences that the matter came before the judge. There has since been added, pursuant to the leave of this court, a third defence, to which I will refer in due course.

The first defence was that of set-off. The defendants claimed a set-off of so much of a judgment debt for over 5,000*l.* as might be required. The second defence was that the liability for rent in the events which had happened was not a liability to the trustee in bankruptcy but to a building society to whom the bankrupt had mortgaged the premises. There was also a somewhat faint suggestion of a defence on the lines of *Ex parte James* (1) that this was not a case which the court ought to allow its official, the trustee in bankruptcy, to pursue.

The first defence arose in the following circumstances. [His Lordship stated the facts in relation to the first defence and continued :] It is the sum of 5,562*l.* 11*s.* 5*d.* for which judgment was ultimately given, or rather the appropriate part of it, that the defendants seek to set off against the trustee. So far as the first two quarters' rent which accrued due before the beginning of the bankruptcy are concerned, Mr. Aronson, for the trustee, admits that, if it were not for an undertaking, given in the circumstances to which I will refer in a moment, the defendants would have a right of set-off under the provisions of s. 31 of the Bankruptcy Act, 1914. That section, as far as material, provides : " Where
" there have been mutual credits, mutual debts or other
" mutual dealings, between a debtor against whom a receiving
" order shall be made under this Act, and any other person
" proving or claiming to prove a debt under the receiving
" order, an account shall be taken of what is due from the one
" party to the other in respect of such mutual dealings, and the
" sum due from the one party shall be set off against any sum

(1) (1874) L. R. 9 Ch.609.

“due from the other party, and the balance of the account, “and no more, shall be claimed or paid on either side respectively.” Mr. Aronson very properly admitted that he could not dispute that the frauds alleged by the defendants against the bankrupt were so linked with contract that the right of set-off would arise. But he said that the undertaking given to the court as a condition of obtaining a removal of the stay in the King’s Bench action prevented the defendants relying on set-off.

The circumstances in which that undertaking was given were as follows: The judgment which I have already mentioned having been recovered and the defendant having been made bankrupt, the trustee on August 13, moved for a stay. That matter came before the court in due course and a stay was granted temporarily. When the matter came before the court on August 31, it was stood over until the first available day in the autumn sittings, the stay being continued upon the applicant’s undertaking that, if he pursued Or. 14 proceedings in the action with which we are now concerned, he would not do so as to make the summons under Or. 14 returnable before October 20, 1948. That order having been made, the matter came again before Slade J. on October 15; and on that occasion, the plaintiffs by their counsel—that is, the defendants in this present action—undertaking not to prove in bankruptcy their claim, the subject-matter of the King’s Bench proceedings, no order was made except that the stay be removed. That was the undertaking which was given, and it was the condition under which the stay was removed; and the defendants were enabled to quantify their judgment in the King’s Bench proceedings.

Mr. Browne, for the defendants, says that the undertaking was limited and only prevented them from using the King’s Bench judgment as a weapon of offence: it debarred them, so he says, from lodging a proof, but it did not debar them from using it as a weapon of defence by way of set-off. That set-off, he says, accrued when the writ was issued in the Chancery proceedings on August 19, 1948, and was not affected by the undertaking. On any other view, according to Mr. Browne, the removal of the stay would be valueless since he could not prove his debt; and as the debt arose not out of pure tort but out of fraud connected with the contract, the claim would be barred when the debtor got her discharge. He relied in support of his argument on some observations of Lord Esher

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C. A. M.R. in *Sovereign Life Assurance Company v. Dodd* (1), where
 1949 the Master of the Rolls said: "What is the result of a plea
 " of set-off? It is not a counter-claim or a cross-action, but
 " a plea in bar; and therefore, in cases where the plea is made
 " out, although it may be true that when the action was
 KITCHEN'S brought the defendant was a debtor of the plaintiff, yet, the
 TRUSTEE " plaintiff being the defendant's debtor to the same amount,
 v. " the plaintiff's claim is barred. Bankruptcy, therefore,
 MADDERS. " makes no difference to the right of set-off."
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Mr. Aronson says, however, that the defendants' contention is based on a complete misconception of the situation. The damages recovered were damages for fraud, and on the basis of the undertaking given this would not be a provable debt. He referred us to s. 30 of the Bankruptcy Act, 1914, which makes it clear that unliquidated damages arising otherwise than by reason of contract or breach of trust are not provable in bankruptcy. He says that what the defendants were getting out of the removal of the stay was that, by undertaking that their judgment debt would not be treated as a provable debt, they were obtaining recognition of it as a claim in pure fraud which, when quantified, would leave them free to take whatever proceedings they might think appropriate, including, if they thought fit, steps to make the debtor bankrupt again; alternatively, if she got her discharge, they could seek to recover from the bankrupt.

The judge considered this point and dealt with it as follows (2): "As to pre-bankruptcy instalments, Mr. Aronson was driven to rely on the undertaking. The right of set-off in bankruptcy is the creature of statute and arises under s. 31 of the Act. Under that section there must be mutual dealings between the debtor and any person proving or claiming to prove a debt under the receiving order. In the present case, the tenants, having regard to their undertaking, cannot either prove or claim to prove a debt under the receiving order, and therefore do not come within s. 31. To that contention I see no answer, and therefore there is, in my judgment, no right of set-off against either the pre-bankruptcy or the post-bankruptcy instalments." I respectfully agree with the conclusion reached by the judge. The real meaning of the undertaking is, I think, that the damages were not to be treated as a provable debt. If the defendants were now allowed to set off this debt, or part of it, against the claim

(1) [1892] 2 Q. B. 573, 578.

(2) [1949] Ch. 588, 593.

for rent, they would be getting through a back door what they had undertaken not to take out of the front door. It is wrong, I think, to say that set-off is a mere matter of defence on the facts of this case. The effect, if we were to take the opposite view, would be that the asset of the rent would be taken out of the estate for the exclusive benefit of the defendants, who could remain in possession for the whole term without contributing one penny to the estate. I think that when the defendants undertook not to prove this debt they were in effect agreeing that the debt should not be treated as a provable debt, and if it were not a provable debt it clearly could not be the subject of set-off under s. 31.

As to the last three quarters' rent which accrued due after the commencement of the bankruptcy, there was, I think, no mutuality, and therefore there could be no set-off. I agree with the reasons given by Harman J. in his conclusion on this point. He referred to *Alloway v. Steere* (1). I need not read the citation from the headnote, which is set out in full in his judgment. He pointed out that it was exactly the converse of the present case, and I accept his view; it seems to me to justify the conclusion to which he came. I ought, however, perhaps to refer shortly to the two cases on which Mr. Browne relied. The first of them was *Lawrence v. Hayes* (2). In that case, to quote the headnote, "The owner of a business sold it to the defendant on terms of payment by instalments, and then assigned the benefit of the agreement to the plaintiff. Before notice of assignment was given to the defendant, the latter obtained judgment for a sum of money against the assignor as damages for breach of warranty on the above sale. In an action by the plaintiff, as assignee, against the defendant for payment of instalments due under the assigned agreement, the defendant claimed to set off the amount of the judgment. The plaintiff contended that the defendant's right to damages in respect of the breach of warranty had merged in the judgment, and that the latter could not be set off against his claim: Held, that the set-off was valid."

That case, as it seems to me, is a long way from the point with which we are dealing. In the first place that was a matter of contract and did not turn on the terms of a lease, which is something separate from the contract; and the whole matter was so plainly linked that I do not think there is any doubt that there was a right of set-off. Moreover, it is to be

(1) 10 Q. B. D. 22.

(2) [1927] 2 K B. 111.

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observed, as Mr. Aronson pointed out, that that was a case in which the complications of bankruptcy did not arise, and the court was not concerned with the terms of s. 31 of the Bankruptcy Act, 1914. The other case which, as Mr. Browne frankly admitted, was perhaps apparently more in direct relation with what we are dealing with, was *Stoddart v. Union Trust Ltd.* (1), where the question of fraud did arise. In that case, to quote the headnote, "The defendants entered into a contract for the purchase of a newspaper for a sum of 1,000*l.*, of which 200*l.* was paid on the completion of the contract, and the balance of 800*l.* was to be payable by certain instalments. The defendants were induced to enter into the contract by fraudulent misrepresentations made to them by the vendor. The vendor for valuable consideration assigned the balance of the purchase money by deed absolutely to the plaintiff, and notice in writing of that assignment was given to the defendants. The plaintiff at the time of that assignment had no notice of the fraud on the part of the vendor. In an action by the plaintiff against the defendants for the debt of 800*l.* so assigned, the defendants pleaded, by way of defence, in substance, that they were induced to enter into the contract for the purchase of the newspaper by the fraud of the vendor, and that by reason thereof they had sustained damage exceeding 800*l.*, and no money was due from them at the date of the assignment to the plaintiff and, in the event of their being held liable to pay the sum claimed by the plaintiff, they counter-claimed against the vendor damages for fraud to an equal amount. The defendants were not in a position, and did not claim, to rescind the contract for the purchase of the newspaper. At the trial the jury found that the defendants had been induced to enter into the contract for purchase of the newspaper by the fraud of the vendor, and had thereby sustained damage to the amount of 800*l.* The judge on those findings gave judgment for the defendants on the plaintiff's claim and judgment for the defendants against the vendor for 800*l.* damages upon the counterclaim, but stayed execution on the latter judgment." This court, however, held "upon the above-mentioned facts, that the defendants could not set up the claim to 800*l.* damages for the fraud of the vendor by way of defence against the claim of the plaintiff, and that the plaintiff was

(1) [1912] 1 K. B. 181.

"entitled to judgment against the defendants for 800*l.*" There also, however, no question of bankruptcy was involved, and I do not base my conclusion on anything to be found in either of the two cases to which I have last alluded.

Here we are considering instalments of rent which accrued due for the first time after the commencement of the bankruptcy; we are considering, therefore, debts which were never due to the bankrupt but which became due to the trustee. It seems to me in those circumstances impossible to say that there is such mutuality between the claim for rent due to the trustee and the claim for fraudulent misrepresentation against the bankrupt as to found a right to set off within s. 31 of the Bankruptcy Act, 1914. For these reasons I think that the judge was right when he rejected the defence based on set-off.

The next defence to which I have to refer is the defence based on the mortgage by the bankrupt to the Provincial Building Society. That was a legal charge under which the mortgagor was entitled to remain in possession until certain events occurred (amongst others, committing an act of bankruptcy), and he attorned tenant to the society at a yearly rental of a peppercorn, the society, of course, having the right to take possession on one week's notice to quit given to the mortgagor. I should add that under cl. 10 of the deed the mortgagor was not without the previous consent in writing of the society to exercise any of the powers of leasing conferred on a mortgagor by s. 99 of the Law of Property Act, 1925. In the result, therefore, as between the mortgagor and the mortgagees, the mortgagor had no right to grant to the defendants the lease which she did grant in 1947. The defence based on that document is framed in the following way: it is alleged in para. 10 of the defence that, in view of that document, the right of the mortgagor to receive rent had determined. That was the defence set up.

Mr. Browne's argument on that point is very clearly stated by Harman J. He says this (1): "Mr. Browne cited "s. 98 of the Law of Property Act, 1925, which provides: " 'A mortgagor for the time being entitled to the possession " 'or receipt of the rents and profits of any land, as to " 'which the mortgagee has not given notice of his intention " 'to take possession or to enter into the receipt of the " 'rents and profits thereof, may sue for such possession " 'or for the recovery of such rents or profits,' and he

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(1) [1949] Ch. 588, 594.

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“ contended that the trustee, although claiming through
 “ the mortgagor, is not entitled to sue, because, in fact, notice
 “ has been given by the mortgagee (the building society)
 “ of intention to take possession. In support of that con-
 “ tention he cited the old case of *Moss v. Gallimore* (1), which
 “ is still good law and appears in Smith’s Leading Cases, and
 “ the sidenote to which is: ‘A mortgagee, after giving notice
 “ ‘ to the tenant in possession under a lease prior to the mort-
 “ ‘ gage, is entitled to the rent in arrear at the time of the
 “ ‘ notice, as well as to what accrues afterwards and he may
 “ ‘ distrain for it after such notice’ Therefore, it was
 “ contended, the building society, if it gave effective notice,
 “ could give a good receipt for the accruing rent, so that it
 “ follows that the tenants are in peril in that way of having
 “ to pay the rent twice.”

When the matter was before Harman J., the argument that the mortgagees could sue the defendants for rent derived some support from the judgment of Vaisey J. in *Dudley & District Benefit Building Society v. Emerson* (2). That decision of Vaisey J. was reversed by the Court of Appeal (3). It is now clear, I think, that if the mortgagees could recover anything against the defendants it could be only as mesne profits. But, as the Master of the Rolls pointed out in the course of the argument, the right to mesne profits depends on unlawful withholding of possession. Until the mortgagees began proceedings against the trustee and the defendants on October 25, 1948, the mortgagor was entitled to possession. As between the defendants and the mortgagor, the defendants were entitled to be in possession. The defendants, therefore, were not wrongfully withholding possession from anyone. All the rent which is here sued for accrued due before October 25, 1948; and for this reason, as it seem to me, this point really has no substance. Indeed Mr. Browne did admit that the decision of this court in the *Dudley* case (3) made it very difficult to sustain the argument which he advanced with great force in the court below, and which Harman J. recognized as a difficult point as the authorities then stood.

If the true effect of the undertaking given by the defendants in the King’s Bench action be as I have stated, there can be nothing dishonourable in the action of the trustee in

(1) 1 Dou. 279; 1 Sm. L. C. (2) [1949] W. N. 138.
 13th ed. 565. (3) [1949] Ch. 707.

instituting the present proceedings. I need say no more about the defence based on *Ex parte James* (1).

That being so, it appears that, on the pleadings as they were in the court below, the defendants failed completely in their defences, and that the plaintiff was entitled to the judgment which he recovered before Harman J. But, for the reasons which the Master of the Rolls gave yesterday, we have allowed the pleadings to be amended and have allowed the defendants to set up an alternative defence based on the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939. It is common ground between the parties that the rateable value of the property comprised in the lease was, on April 1, 1939, 72*l.* a year; and it is not disputed, and cannot be disputed, that, if the house was at that date let as a dwelling-house, it was then within the Rent Restriction Acts. It was proved in evidence before us today that it was at that date let as a dwelling-house and occupied as a dwelling-house at a rent of 140*l.* a year.

The question, however, remains whether the defendants had a lease which permitted user as a dwelling-house. The Master of the Rolls referred to the relevant clauses of the lease when giving judgment on the question whether the amendment should be allowed, because quite plainly the amendment and further evidence could not be allowed unless, if allowed, either it would be conclusive or it would raise a very strong *prima facie* case. The Master of the Rolls gave our reasons for coming to the conclusion that, if the evidence established the facts that were alleged, there would be raised a strong *prima facie* case that at all material times this house was let on terms which permitted user as a private dwelling (2). I do not propose to repeat what he then said. I would add that the evidence given this morning seems to me strongly to reinforce the conclusions which he stated. It appears that the dwelling-house now in question was a ten-bedroom house. The defendants were living there with their two children; they were there throughout; one room was reserved for the exclusive use of the family, being occupied at all times by the children and during the season by the parents also; and, in addition to this bedroom in the attic, there was also reserved for the use of the family a sitting-room on the ground floor. It seems to me that those facts reinforce the conclusion to

(1) L. R. 9 Ch. 609.

of Evershed M.R. referred to is

(2) The part of the judgment set out at the end of this report.

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which the Master of the Rolls came, and that there is nothing in the terms of the lease which can prevent us from holding that this house was at the material time a dwelling-house within the meaning of the Acts. The effect of that, of course, is that the rent was payable only at the rate of 140*l.* a year instead of at the rate of 500*l.* a year. On that basis, Mr. Browne claims that the sum recoverable, instead of being 625*l.*, should be 85*l.* In making that calculation, however, he went too far, because he tried to set off the 90*l.* (which his clients had overpaid for the quarter's rent paid in advance, not only against the first two standard quarters' rent aggregating 70*l.*, as to which it was clearly a proper subject-matter of set off, but also (to the extent of 20*l.*) against the rental accrued due after the institution of this action. For the reasons already given I do not think that the set-off can be applied as regards the last three quarters' rent. In my view, therefore, the proper sum for which judgment should be entered for the plaintiff is three quarters' standard rent, that is, 105*l.*

For these reasons I think that the appeal should be allowed and judgment entered for the sum which I have stated. Having regard to the fact that the defendants have only succeeded on a defence which was not pleaded or raised in the court below, and had only got it in by amendment, I think that we shall require to hear argument on the question of costs.

ASQUITH L.J. : I agree, and would only add that there is a decision of the Court of Appeal of Northern Ireland in *Burns v. Radcliffe* (1), which seems very closely in point. There, as in the present case, there was a lease of hotel premises to the defendant, and the defendant resided on the premises. In that case, as in this, it was a term of the lease that the defendant should use the premises for the purposes of a temperance hotel only. Yet the court held, in a decision which the Irish Court of Appeal upheld, that the Rent Restriction Acts applied and protected the lessee from proceedings for possession. Moore L.J. said (2) : " Where the nature of the " business is not incompatible with the residence of the tenant, " if, as in this case, it would almost require it, I can see no " reason for holding that the whole premises were not her " dwelling-house." That decision, so far as it goes, supports the conclusions at which my Lord has arrived and with which I agree.

(1) [1923] 2 I. R. 158.

(2) *Ibid.*, 162.

EVERSHED M.R. : I am entirely of the same opinion and Mr. Browne will not think me unappreciative of his careful and cogent argument if I add no reasons of my own.

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*Appeal allowed to the extent
of the additional defence.
Appellants to recover one-half
of their costs of the appeal.*

Solicitors : *Gibson & Weldon for Knowles & Foxcroft,
Blackpool ; Sidney Pearlman.*

H. C. G.

[NOTE.]

EXTRACT FROM JUDGMENT ON THE APPLICATION FOR
LEAVE TO ADDUCE FURTHER EVIDENCE AND TO
AMEND THE PLEADINGS.

Nov. 24. EVERSHERD M.R. There is only one further matter to which I need allude. That is the question I have already referred to whether on the facts it can be said that the defendants have occupied these premises and were occupying them at the material date as a dwelling-house ; to put it more precisely, were the premises let as a dwelling-house at the material date ? Going back, for a moment, to the earlier lease, it is significant that the premises in 1932 were described as " all that messuage or dwelling-house known as Roslyn." It does not appear that the premises were then, at any rate, described as a boarding-house. However that may be, when the lease to the present defendants was entered into the premises were described thus : " All " that the premises known as the Roslyn Private Hotel." I assume, and no doubt it is the fact, that the defendants acquired these premises for, and ran them as, a boarding-house. I have already referred to the evidence in the affidavit which states, among other things, that the neighbourhood consists mainly of residential small hotels and boarding-houses. The lease of 1947 contained the following covenant by the lessee (and it is upon this that the main point turns) : " Not to use the demised " premises nor allow them to be used for any purpose other than " that of the business or trade of a hotel proprietor or boarding-house " keeper or any manner inconsistent with such user without the consent " in writing of the landlord first had and obtained." I will assume that, on the evidence in the affidavit, there is no doubt that the defendants in fact lived on these premises ; and in any case, as Mr. Aronson stated, they have used them as their home ever since they acquired the lease. But that leaves the question whether, having regard to the facts, they can say that it was let as a dwelling-house. On that point again, Mr. Browne, who has, if I may say so, fortified all his points with appropriate authority while keeping the argument brief and to the

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point, referred us to two cases. The latter, *Vickery v. Martin* (1), will for the present purpose, alone suffice. I should state that the Rent Restriction Acts lay down that premises do not cease to be within them by reason of the fact that they are in part used for business purposes. Amongst other things, this case decided that that provision means what it says, and that the court is not concerned to see how substantial the part is that is used for business purposes. It must be still true to say that it is a dwelling house, the home of the tenant claiming the protection of the Act, because, as has been many times stated, one of the main objects of the Act is to protect persons who are tenants from being evicted from their homes. In the course of his judgment in *Vickery v. Martin* (2), Lord Greene M.R. said: "The county court judge found that the parties intended that the house should be used as a boarding-house. That certainly does not bring the landlord home, or anywhere near home, because the user as a boarding-house is not inconsistent with the house being a dwelling-house within the meaning of the Rent Restriction Acts." Mr. Browne, in referring to that passage, had, I think, in mind the language of the covenant against user "otherwise than for the trade of a hotel proprietor or boarding-house keeper, or in any manner inconsistent with such a user." The point can be put thus: on the facts, assuming that the defendants lived and had their home on the premises, but at the same time ran there a boarding-house in the ordinary acceptation of the word, was that a breach of the covenant? Though I am not necessarily excluding further evidence or further argument, on the matter as it now stands it seems to me that the second condition is fulfilled, that is to say, I think it at least reasonably probable that on this point it would be held that this was not a breach of covenant, and that, as such user was contemplated by the lease, the defendants can fairly say that this was let as a dwelling-house at the material date. Other matters of fact may have to be investigated, but, assuming that point in Mr. Browne's favour, as I do, it is, at the least, reasonably probable that the conclusion of the court will be that the amount claimable for rent would be limited.

(1) [1944] K. B. 679.

(2) *Ibid.* 681.

Affirmed.
[1950] 1 Ch. 269

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Ex parte MCGREAVEY v. BENFLEET URBAN
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Nov. 7, 21;
Dec. 5

Romer and
Harman, JJ.

Bankruptcy—Sum due for unpaid rates—Payment not enforceable by action—Whether good petitioning creditor's debt—*Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59), ss. 4, 30, 33.

An unpaid demand for rates is a "debt" within the meaning of s. 4, sub-s. 1, of the *Bankruptcy Act*, 1914, although it is not

enforceable by action at law. A local authority may accordingly petition in bankruptcy in respect of such a demand.

Dicta of Cockburn C.J. in *Ex parte Muirhead* (1876) 2 Ch. D. 22, not followed, and of Slesser L.J. in *Liverpool Corporation v. Hope* [1938] 1 K. B. 751, explained; *In re North Bucks Furniture Depositories Ltd.* [1939] Ch. 690, considered and applied.

Per curiam: Company legislation is exactly parallel to bankruptcy legislation in respect to unpaid rates. It would be a lamentable anomaly if it were the law that arrears of rates were a good debt on which to found a petition for winding up a limited company, but not a good debt on which to found bankruptcy proceedings if the debtor happened to be an unincorporated association.

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APPEAL from a receiving order made on September 28, 1949, by the registrar of Southend county court.

The order was made against two persons called Francis Bernard McGreavey and Frederick Leslie Rundle, who were described in the order as "lately trading in co-partnership "under the style or firm of McGreavy & Rundle." The order was made with the consent of the debtor Rundle and he was no party to this appeal, but McGreavey resisted the petition, though not on any grounds now taken, and appealed against the order. At the hearing both the grounds of appeal stated in his notice of appeal dated October 18 last were abandoned, and by the leave of the court a new and additional ground was put forward, to wit, that "the debt alleged in the petition is not a good petitioning "creditor's debt in law." The petitioner was the Benfleet Urban District Council and the foundation of the petition was a large sum admittedly due to the council for rates on a stadium where the partnership business was formerly carried on. The act of bankruptcy was the execution by the debtors of an assignment of their property to a trustee for the benefit of their creditors, to which the council did not assent.

Aronson K.C., *Muir Hunter* and *Savin* for the debtor. The sole question is whether or not an unpaid demand for rates constitutes "a good petitioning creditor's debt." The debtor's contention is that, as such a demand can be enforced only by a levy of distress, and not by action, it is not a debt within the meaning of s. 4, sub-s. 1 of the Bankruptcy Act (1).

(1) Bankruptcy Act, 1914, "owing by the debtor to the s. 4, sub-s. 1: "A creditor shall "petitioning creditor . . . "not be entitled to present a "amounts to fifty pounds and "bankruptcy petition against a "(b) the debt is a liquidated "debtor unless (a) the debt "sum payable either immediately

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The statutes dealing with rates and enforcement of demands are conveniently set out in Ryde on Rating, 8th ed. The present system of rating was first instituted by the Poor Relief Act, 1601, ss. 1 and 2. The Distress for Rates Act, 1849 regulates the levying of distress and gives power to justices, to award imprisonment for non-payment up to three months. The Rating and Valuation Act, 1925, abolished the old poor rate and substituted a general rate recoverable in the same way as the old rate. The Money Payments (Justices Procedure) Act, 1935, by s. 10 provided that warrants of committal are not to be issued unless non-payment is due either to wilful refusal or to culpable neglect; and when application is made for a warrant the justices are empowered to remit the payment of rates to which the application relates. The Courts Emergency Powers Rules, 1943 (1), further limit the powers of levying distress. These statutory provisions were considered in *Liverpool Corporation v. Hope* (2), in which it was held that an action by a local authority to recover unpaid arrears of rates will not lie. In *In re North Bucks Furniture Depositories Ltd.* (3) it was held that an unpaid demand for rates would support a petition for winding up a company, but that case was argued only on one side, should not be considered relevant to bankruptcy proceedings, and is not binding on a Divisional Court: see the observations of Lord Goddard C.J. in *Huddersfield Police Authority v. Watson* (4). In *Ex parte Muirhead* (5), Cockburn C.J. stated that a good petitioning creditor's debt must be enforceable by action at law or in equity, and this proposition is supported by *In re O'Gorman* (6) and *In re Sacker* (7). Section 30, sub-s. 8 of the Bankruptcy Act shows that many things can be proved for which are not properly debts. A liability for rates cannot be a debt within the meaning of s. 4, sub-s. 1 (a) of the Act, as it cannot be a fixed or liquidated sum as required by sub-s. 1 (b) until the

"or at some certain future time."

Section 33, sub-s. 1: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—(a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next

"before that time"

(1) St. R. & O. 1943, No. 1113, L. 22. See Stone's Justice's Manual, 1949 ed., p. 2925.

(2) [1938] 1 K. B. 751.

(3) [1939] Ch. 690.

(4) [1947] K. B. 842, 848.

(5) (1876) 2 Ch. D. 22, 25.

(6) [1899] 2 Q. B. 62.

(7) (1888) 22 Q. B. D. 179.

matter has been before the justices, who have the power to reduce the amount if they think fit. The right to seek committal under the Distress for Rates Act, 1849, is penal and not an additional method of recovering the sum due: see *In re Edgcome* (1).

Further, rates cannot be the subject of a bankruptcy notice because, as they cannot be the subject-matter of a judgment debt, the local authority must wait to petition until the debtor commits some extraneous act of bankruptcy. The records of the Bankruptcy Court disclose no previous example of a petition of this nature.

Muir Hunter following. Section 6 of the Bankruptcy Act, 1869, provided that "the debt of the petitioning creditor" must be a liquidated sum due at law or in equity". Such words were made unnecessary by the fusion of law and equity in 1873, but the substance of a good petitioning creditor's debt has remained unchanged. The ratio decidendi in *In re O'Gorman* (2) and in *In re Sacker* (3) was that there was no debt, and the same was the case in *Ex parte Jones* (4), concerning an infant trader. It is nowhere suggested in the Rating Acts that the ratepayer is a debtor. It would be inequitable to enforce by bankruptcy proceedings a claim which has not been dealt with by the justices. *Blackpool and Fleetwood Tramroad Co. v. Bispham U.D.C.* (5) shows how they can exercise their jurisdiction to protect ratepayers.

Christie K.C., *L. Caplan* and *N. C. Lloyd-Davies* for the respondent council. It is conceded that a "debt" within s. 4 of the Bankruptcy Act must be something enforceable. Here the debt due to the council is enforceable by distraint. *Lloyd v. Heathcote* (6) shows that a demand for rates may be a good petitioning creditor's debt. The real question here is the construction of the Acts. Section 3 requires that the petitioner must be a creditor, while s. 4 shows what constitutes a debt. An unpaid demand for rates falls within the language of the section. A comparison of the language of sub-ss. 3 and 8 of s. 30 shows that unpaid rates constitute a "debt" and not a "liability" for purposes of proof and the language of s. 33, sub s. (1) (a) is conclusive that they constitute a debt. The language of Cockburn C.J. in *Ex parte Muirhead* (7) cannot be

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(1) [1902] 2 K. B. 403.

(2) [1899] 2 Q. B. 62.

(3) 22 Q. B. D. 179.

(4) (1881) 18 Ch. D. 109.

(5) [1910] 1 K. B. 592.

(6) (1820) 2 Brod. & B. 388 ;

5 Moore (J. B.) 129.

(7) 2 Ch. D. 22, 25.

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regarded as of universal application. That case was explained and distinguished in *In re a Debtor* (1) by the Court of Appeal, where it was observed that the plaintiff in *Ex parte Muirhead* (2) was a mere conduit pipe and not entitled personally to any debt. Similarly *In re Sacker* (3) merely decided that a receiver is not a creditor within the meaning of the Act. *In re North Bucks Furniture Depositories Ltd.* (4) shows that a local authority is a creditor for the purpose of petitioning for winding-up under the Companies Act, and all the observations made in that case are relevant to s. 33 of the Bankruptcy Act.

The deed of assignment here was the bankrupt's own act, and a creditor is entitled to take steps to have the assets properly administered in bankruptcy. It cannot be said that this debt is unliquidated, as remission by the justices does not arise unless the local authority applies for a committal order. The amount due in the present case has never been disputed.

Caplan following. The debtor, in order to succeed, must show that "debt" in s. 4 does not include rates. This is in itself a limiting section, and there is nothing in its language to support such a contention. The Act deals with three classes of obligations: debt, liability, and provable debt. Section 30, sub-s. 3 refers to "debts and liabilities," so the draftsman had another word available for things other than debts, and has not used that word in relation to rates; on the contrary, in s. 33, sub-s. 1, rates are to be payable in priority to "all other debts," so rates must be "debts." They must also be "debts" within s. 4, as it is improper to put different constructions on the same word in different sections of a statute unless there are strong reasons for doing so: see *In re National Savings Bank Association* (5). If the debtor is right, this is the only form of preferential debt which is not a good petitioning creditor's debt.

C. W. Chandler for the Official Receiver. It is confirmed that the records of the Bankruptcy Court show no instance of a petition based on an unpaid demand for rates.

Aronson K.C. in reply: If the council are right, this is the only form of petitioning creditor's debt which does not permit the creditor to force an act of bankruptcy. It is contrary to the spirit of all bankruptcy proceedings that a creditor cannot make use of them without some initial act of the

(1) [1938] 2 All E. R. 530.

(2) 2 Ch. D. 22.

(3) 22 Q. B. D. 179.

(4) [1939] Ch. 690.

(5) (1866) L. R. 1 Ch. 547.

debtor or of a third party. *Lloyd v. Heathcote* (1) does not help the council's case, : see *In re Hunter* (2). [He also referred to *Phillips v. Naylor* (3).]

Cur. adv. vult.

Dec. 5. HARMAN J. [reading the judgment of the court, stated the facts and proceeded:] There can be no doubt that there has been an act of bankruptcy within s. 1, sub-s. 1 (a), of the Bankruptcy Act, 1914. The point now taken involves a novel issue which may be shortly stated. It is that the only remedy which a local authority have for the recovery of rates is the statutory remedy of distress, and that this is in fact an attempt, and the first attempt made for 300 years, to enforce payment of rates by other than the statutory means. The authority retort that there is no doubt that rates are a debt provable in bankruptcy, having indeed a certain priority under the Bankruptcy Act, 1914, and they urge that, if a debt (as opposed to a liability) is provable, it will support a petition.

Rates were first created by the statute 43 & 44 Eliz., c. 2, which enacts that the churchwardens and householders appointed for the purpose shall raise weekly or otherwise by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, and so on, in the parish any such competent sum as they think fit, and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind and such others being poor and not able to work. Section 2 of this statute authorizes the overseers by warrant from two justices to levy the rates and arrears by distress and sale of the offender's goods. By the Distress for Rates Act, 1849, justices are empowered to issue a warrant of commitment against persons not having goods and chattels on which distress can be levied and to keep such persons in prison for three months. By the Money Payment (Justices Procedure) Act, 1935, the power to issue a warrant for commitment is limited to cases where the failure to pay is found to have arisen from the wilful refusal or culpable neglect of the ratepayer, and the justices are empowered, where they decline to issue a warrant, to remit the payment of rates.

Turning now to the bankruptcy legislation, the Act of 1914, by s. 1, sub-s. 1 (a), provides the act of bankruptcy in this

(1) 2 Brod. & B. 388 ; 5 Moore (J.B.) 129.

(2) (1879) 3 L. R. Ir. 465.

(3) (1858) 3 H. & N. 14.

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case. Section 3 provides who may present a petition, namely, for the present purpose, a creditor. Section 4 limits the nature of the debt, which must, by sub-s. 1 (b), be a liquidated sum payable either immediately or at some certain future time. By s. 30, the debts and liabilities provable in bankruptcy are described, and sub-s. 8, which defines the word "liability," shows that a good many claims may be proved which could not support a petition. Section 33 provides, by sub-s. 1, that there shall be paid . . . "in priority to all other debts" (a) . . . local rates due from the bankrupt." It is clear, therefore, that rates are a debt within the meaning of this Act, because the last-mentioned section speaks of "other" debts. That, however, it is said, does not conclude the question. We are reminded that under the Bankruptcy Act, 1869, s. 6, a debt, in order to support a petition, must be a debt "due at law or in equity," and it is said that these words must necessarily mean enforceable by action in a court of law or equity. Before the Act of 1869, an equitable debt was provable, but would not support a bankruptcy petition. The reason for this is not apparent. The position was changed by the Act of 1869. After the Judicature Act, the words "due at law or in equity" disappeared, owing to the fusion of the two systems, but it is said that the law remains the same and that one test of whether a debt will support a petition is whether it can be the subject-matter of an action in court.

The debtor starts with this, that ever since the year 1601 the only remedy ever expressly given for the enforcement of rates was the remedy of distress, aided possibly by committal, though that has been held to be a punitive remedy and not a method of enforcement: *In re Edgcome* (1). The debtor cites and relies on *Liverpool Corporation v. Hope* (2), where the head-note is in these terms: "An action by a local authority to recover unpaid arrears of rates will not lie. The proper method of procedure in such a case is by an application for a distress warrant followed by distress. A local authority commenced proceedings in the county court for certain unpaid arrears of rates which they alleged to be due. The county court judge having held that on such a claim an action would lie, the respondent appealed. Held (reversing the decision of the county court judge), that, a rate not being a common-law liability but the creature of statute, this method of procedure was wrong, and the only remedy

(1) [1902] 2 K. B. 403.

(2) [1938] 1 K. B. 751.

"available was that laid down by statute, namely distress." Slessor L.J., giving judgment, said (1): "It is sufficient to say that it is really not suggested, and it could not be suggested, that any statute from the year 1601 down to the Rating and Valuation Act, 1925, or any Act amending that Act, has ever provided the local authority with any remedy for the non-payment of rates other than the remedy by distress. In those circumstances the learned county court judge does not, as I understand it, suggest that there is any remedy at common law by action for the non-payment of rates, but he does suggest that an analogy should be drawn between a rating authority demanding rates and a landlord demanding rent." Then he cited a passage in the judgment of the county court judge and continued: "It is elementary that the right of a landlord to sue for his rent arises either out of some express covenant or contract or out of tenure. There is no such relationship, there is no such contract, as between the local authority and the ratepayer, and the whole analogy is unsound." Slessor L.J. had earlier said (1): "As to the first ground"—that is the first ground of appeal—"which appears on the face of it to be an ordinary common-law claim for debt, it is clear to my mind that the only remedy which is afforded to a local authority entitled to rates is the remedy of distress."

Of course, if that be the whole law on the subject, there is an end of the matter. It seems to us, however, that the Lord Justice was in fact addressing his mind only to the question before him, namely, whether a remedy by action was available, and his decision merely negatives this.

The debtor further relies on *Ex parte Muirhead* (2). That was a case in which the Court of Appeal held that a husband in a divorce suit, in whose favour the Divorce Court had made an order that the damages against the co-respondent should be paid to him on his undertaking to lodge the money recovered in court, could not support a bankruptcy petition. In our judgment, the true ratio decidendi of that case rests on the opinion of the court that the money was not due to the petitioner, who was merely a kind of conduit pipe appointed by the court to collect money to which he had no claim himself.

(1) [1938] 1 K. B. 754.

(2) 2 Ch. D. 22.

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That is the view of the decision recently expressed by Lord Greene M.R., in *In re a Debtor* (1). Cockburn C.J. did, however, say this in *Muirhead's* case (2): "Now in order to constitute a good petitioning creditor's debt you must have that which may be the immediate subject of an action at law or suit in equity." This is clearly an echo of the Act of 1869 then in force. Mellish L.J., after referring to the same words "debt due either at law or in equity," founded himself on the view that the debt must be payable to the petitioner. This last view was enough to decide the question, and the statement of Cockburn C.J. quoted above was, in our judgment, obiter dictum.

In *In re O'Gorman* (3), Wright J. accepted the decision in *Muirhead's* case (4), but held that a sum ordered to be paid to the petitioner in divorce was a good provable debt. That was all he was called on to decide.

In re Sacker (5), also cited to us, must, having regard to the observations in *In re Macoun* (6), be taken to be authority only for the view that a receiver as such is not a "creditor," even though there be an order for payment of a balance to him. It follows that unless he has some other right (for example, if he be the holder of a bill of exchange entitling him to take action in his own name) he cannot support a bankruptcy petition: secus a receiver who has a personal right to sue (cf. *Ex parte Harris* (7)). All these cases, however, still leave us without an example which satisfies us that there can be a provable debt (as opposed to a liability) due to the petitioner, and not merely payable to him on behalf of another, which will not support a bankruptcy petition. As we have said, there are many liabilities provable which will not support a petition, but that is not the same thing. The instance of a statute-barred debt was advanced to us, but that seems to us to be in essence an unenforceable liability rather than a debt. It may, it is true, be used as a shield by way of set-off, or give a right of retainer, but it is not a debt in respect of which any active step can be taken. Again we were referred to infants' debts which will not support a petition: *Ex parte Jones* (8). But the reason stated by Jessel M.R. for that decision was

(1) [1938] 2 All E. R. 530, 533.

(2) 2 Ch. D. 22, 25.

(3) [1899] 2 Q. B. 62.

(4) 2 Ch. D. 22.

(5) 22 Q. B. D. 179.

(6) [1904] 2 K. B. 700.

(7) (1876) 2 Ch. D. 423.

(8) 18 Ch. D. 109, 120.

that money owing by an infant was not a legal debt, but only (where the infant has acted fraudently) a liability in equity to pay a sum of money.

We do not see why, in the face of the express words of the Bankruptcy Act, which show beyond doubt that rates are a provable debt, they will not support a petition merely because they cannot be sued for by action at law. This can only be so if rates are not a "debt" within s. 4 of the Act, and, in our judgment, they must be a "debt" within that section having regard to the fact that they are manifestly debts within s. 33. To hold otherwise would be to construe one word in two senses in different parts of the same statute.

We were referred by Mr. Aronson to an Irish case, *In re Hunter* (1), in which the head-note is as follows: "The statute " 12 & 13 Vict., c. 91, providing for the collection of rates in " the City of Dublin, makes the Collector-General a creditor, " and empowers him to sue in his own name for arrears of " rates as a debt due to and vested in him; and therefore he " is entitled to avail himself of the procedure in bankruptcy " subsequently provided for the benefit of creditors in general." Mr. Aronson invited us to take the view that it was only because of the terms of the special Act in that case that the Collector-General of rates in the City of Dublin could present a petition. The case turns on the construction of the Irish Act, but it does no more than show that the collector there was a creditor, and carries us, we think, no further.

Mr. Aronson made the further point that rates could not be the subject of a bankruptcy notice because no judgment could be obtained for them, and that the local authority must therefore wait till the debtor committed some act of bankruptcy independent of the volition of the creditor; and he argued that this showed that a species of debt of this special kind was not a debt within s. 4. This point may well, in our judgment, explain the absence of precedent for a petition of this sort, but has no further relevance.

It was further objected that, as no attempt to levy distress had been made in this case, the debt was not liquidated because of the justices' power to remit under the Act of 1935; but in our judgment there is nothing in this. The local authority are under no obligation to apply for a warrant, and if that step be not taken the power to remit does not arise.

(1) (1879) 3 L. R. Ir. 465.

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Lastly, a point was advanced under the Courts (Emergency Powers) Act, 1943, s. 2 (a) (1) and r. 40 of the rules under that Act. On examination, there appeared to be nothing in this point, which was not insisted on.

The urban district council relied chiefly on s. 33 of the Bankruptcy Act, 1914, already referred to, on the analogous legislation in the Companies Acts, and on a decision under the Act of 1929 of Crossman J. in *In re North Bucks Furniture Depositories Ltd.* (1), where he held that a local authority could petition to wind up a limited company for unpaid rates. The judge there founded himself merely on the words of s. 170 of the Companies Act, 1929, which provides that a "creditor" may petition. He held that, having regard to the priority section in the Act (s. 264), rates must be a debt, and the person to whom the debt was owed must be a creditor within the meaning of s. 170. This legislation is exactly parallel to the bankruptcy legislation in this respect, and the case is, we think, on all fours with the present, though not binding on us as a Divisional Court: see per Lord Goddard C.J. in *Police Authority for Huddersfield v. Watson* (2). It would, however, be a lamentable anomaly if it were the law that arrears of rates were a good debt on which to found a petition for winding up a limited company, but not a good debt to found bankruptcy proceedings if the debtor happened to be an unincorporated association.

The council further relied on *Lloyd v. Heathcote* (3), but that case only shows that the court considered rates to be a debt and the collector a creditor within the meaning of the bankruptcy law, notwithstanding the fact that the collector could not sue. It is no authority for the proposition that a petition can be founded on a debt for rates, and carries the council no further, for none can deny that a rate now is a debt in bankruptcy so far as proof is concerned.

For these reasons, while we recognize that this may be a novelty in bankruptcy law—and we have hesitated long, having regard to the Official Receiver's statement to us that there is no record of a petition based on rates in the bankruptcy records—we are of opinion that there is no escape from the language of the Act of 1914, and that this is such a debt as

(1) [1939] Ch. 690.

(2) [1947] K. B. 842, 848.

(3) 2 Brod. & B. 388; 5 Moore

(J.B.) 129.

will support a petition in bankruptcy. We accordingly dismiss the appeal.

*Appeal dismissed.
Leave to appeal.*

Solicitors: *Percy Haseldine & Co.; Zeffertt, Heard & Morley Lawson, for Heard & Coleman, Hadleigh; Solicitor, Board of Trade.*

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In re THE ISLE OF THANET ELECTRICITY
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[1948 T., 00878.]

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Company—Liquidation—Preference shareholders—Claim to share in surplus assets—Onus of proof.

Evershed M.R.
Asquith L.J.
and
Wynn-Parry J.

Article 3 of the articles of association of T. Ltd. provided: "The issued preference shares shall confer on the holders the "right to a fixed cumulative preferential dividend at the rate "of 6 per cent. per annum upon the amounts for the time being "paid up or credited as paid up thereon respectively in priority "to the ordinary shares, and the right to participate *pari passu* "with the ordinary shares in the surplus profits which in respect of "any year it shall be determined to distribute remaining after "paying or providing for the said preferential dividend and a "dividend for such year at the rate of 6 per cent. per annum "on the amounts for the time being paid up or credited as paid "up on the ordinary shares, and the preference shares shall "confer the right on a winding up of the company to repayment "of capital together with arrears (if any) and whether earned "or not of the preferential dividend to the date of the commence- "ment of the winding up in priority to the ordinary shares." T. Ltd. went into voluntary liquidation in 1946. At the date of the liquidation the issued capital of the company consisted of 282,000*l.* preference stock and 150,000*l.* ordinary stock. After paying all arrears of dividend on the preference stock and repaying the capital on the preference and ordinary stock, a substantial balance remained in the hands of the liquidator. Roxburgh J. held that the holders of the preference stock were entitled to participate in the surplus rateably with the holders of the ordinary stock, in proportion to the amount of stock held by them respectively.

Held, (1.) that the onus was on the holders of preference shares to satisfy the court that upon the true construction of the document

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under which they claimed they were entitled to share in a surplus in a winding up. *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* [1949] A. C. 462, considered and applied; *In re William Metcalfe & Sons Ltd.* [1933] Ch. 142, disapproved. (2.) That, in construing an article of association concerning rights to share in profits, the same principle was to be applied in construing both the dividend rights and the rights to share in the company's property in a liquidation. (3.) That the principle to be applied in construing such an article was that, when the article set out the rights attached to a class of shares to participate in profits while the company was a going concern or to share in the property of the company in liquidation, *prima facie* the rights so set out were in each case exhaustive. (4.) That, on the true construction of art. 3, the whole of the distributable profits were expressly dealt with. (5.) That, accordingly, the holders of the preference stock had not discharged the onus of showing that the article was not exhaustive, and they were not entitled to share in the surplus assets. Observations of Sargant J. in *In re National Telephone Co.* [1914] 1 Ch. 755, applied. Observations of Lord Macnaghten in *Birch v. Cropper* (1889) 14 App. Cas. 525, considered.

Decision of Roxburgh J., reversed.

APPEAL from Roxburgh J.

The Isle of Thanet Electricity Supply Co. Ltd. was incorporated on November 3, 1896. By a special resolution of the company passed on March 13 and confirmed on April 10, 1929, the company adopted new articles of association. Article 3 of those articles defined the rights of the holders of the preference and ordinary shares as follows: "The capital of the company is now 500,000*l.* divided into 282,000 " preference shares of 1*l.* each, and 150,000 ordinary shares " of 1*l.* each, all of which have been issued, and 68,000 shares " of 1*l.* each, which have not been issued, and which may " be issued as preference or ordinary shares as may be " determined. The issued preference shares shall confer on " the holders the right to a fixed cumulative preferential " dividend at the rate of 6*l.* per cent. per annum upon the " amounts for the time being paid up or credited as paid up " thereon respectively in priority to the ordinary shares, and " the right to participate *pari passu* with the ordinary shares " in the surplus profits which in respect of any year it shall be " determined to distribute remaining after paying or providing " for the said preferential dividend and a dividend for such " year at the rate of 6 per cent. per annum on the amounts " for the time being paid up or credited as paid up on the

“ordinary shares, and the preference shares shall confer the right in a winding up of the company to repayment of capital together with arrears (if any) and whether earned or not of the preferential dividend to the date of the commencement of the winding up in priority to the ordinary shares. In the event of capital being written off on a reduction of capital amounts paid or credited on the ordinary shares shall be written off before the amounts paid or credited on the preference shares.”

In view of the imminent transfer of the company's electricity undertaking (then its only activity) pursuant to the Margate, Broadstairs and District Electricity Act, 1937, a special resolution was passed on July 16, 1946, for the voluntary winding up of the company, and a liquidator was duly appointed. The company's shares had been converted into stock, and at the date of the liquidation the issued capital of the company consisted of 282,000*l.* preference stock and 150,000*l.* ordinary stock.

Before the liquidation all the arrears of the preference dividend which had accrued during the period were paid in full. The liquidator had gathered in the assets of the company and paid the preference and ordinary stock holders their capital in full. After that payment there remained in the liquidator's hands a balance of approximately 175,000*l.*

By this summons, to which an ordinary stockholder and a preference stockholder were defendants, the liquidator asked : “Whether on the true construction of the articles of association of the company the surplus assets of the company remaining after payment and discharge of all the debts and liabilities of the company and the costs of winding up and the repayment of the capital of the preference and ordinary stock and the arrears of dividend (whether earned or not) on the preference stock to the date of the commencement of the winding up of the company ought to be distributed on the footing that the holders of the preference stock are entitled to participate with the holders of the ordinary stock rateably in proportion to the nominal amount of the stocks held by them respectively or upon the footing that the holders of the preference stock have no right to participate in such distribution or how otherwise the said surplus assets should be distributed.”

Roxburgh J. held that the surplus property of the company was distributable between the ordinary and preference stockholders rateably. An ordinary stockholder appealed.

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Christie K.C. and *Cecil Turner* for the ordinary stockholder. On the question whether the preference shareholders are to participate in surplus assets in the winding up of the company, it is to be noted that all that the preference shareholders were in terms given by the articles of association was payment of a fixed dividend and the right in a winding up to repayment of capital. Nothing is said in regard to surplus assets but, even so, *Roxburgh J.* held that the preference shareholders were entitled to share equally with the ordinary stockholders. In so deciding he followed *In re William Metcalfe & Sons Ltd.* (1). The position, however, is altered by the recent decision of the House of Lords in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (2). The matter has been the subject of a long line of decisions turning on the effect of a provision for payment of the capital of preference shareholders without any express provision giving them a share of surplus assets. The first authority is *Birch v. Cropper* (3), where the provision for payment of capital in a winding up was relied on as showing that all shares started equally. Other cases are *In re Espuela Land & Cattle Co.* (4) and *Will v. United Lankat Plantations Co. Ltd.* (5), where Lord Haldane said that it was a matter of construction in every case, and where the words were "rank," both as regards capital and dividend in priority to other "shares" were held to exhaust the preference shareholders' rights. Other cases are *In re National Telephone Co.* (6); *In re Fraser & Chalmers Ltd.* (7); *Collaroy Co. Ltd. v. Giffard* (8); *In re John Dry Steam Tugs Ltd.* (9); and *In re William Metcalfe & Sons Ltd.* (1) already stated to be overruled in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (2). There Lord Normand said that he preferred the reasoning of *Astbury J.* in *Collaroy Co. Ltd. v. Giffard* (8). The true principle is that, where the specific rights of shareholders are stated, that is exhaustive, as was held in *Will v. United Lankat Plantations Co. Ltd.* (5) and *In re National Telephone Co.* (6).

Gray K.C. and *K. W. MacKinnon* for the preference shareholder. This is a question of construction of the articles. It is submitted that, on the true construction of art. 3, in

(1) [1933] Ch. 142.

(2) [1949] A. C. 462.

(3) (1889) 14 App. Cas. 525.

(4) [1909] 2 Ch. 187.

(5) [1914] A. C. 11 17.

(6) [1914] 1 Ch. 755.

(7) [1919] 2 Ch. 114.

(8) [1928] Ch. 144.

(9) [1932] 1 Ch. 594.

a liquidation the preference shareholders are entitled, first, to be paid their capital and, secondly, any arrears of dividend. The ordinary stockholders are then entitled to be paid their capital, and the balance of the assets are distributable rateably between the preference and ordinary stockholders. The decision in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (1) is distinguishable, as in that case there was an express direction that surplus income was to go to the ordinary shareholders while the company was a going concern. Article 3 in this case gives the preference stock holders wider rights.

It is submitted (1.) that all shareholders have a right in liquidation to share in the assets of a company equally unless that right has been taken away: *Birch v. Cropper* (2) (2.) that it is not necessary to show that the right to share has been expressly taken away, if on the true construction of the articles it is taken away: *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (1); (3.) that if an exhaustive definition in the articles of the rights of the preference shareholders would warrant the inference that they were not entitled to share in surplus assets, here the definition of rights is not so exhaustive as to warrant such an inference; (4.) that when the articles of the company are read as a whole they show an intention not to deprive the preference stockholders of the rights which they would normally have. In *Birch v. Cropper* (2) Lord Macnaghten stated that all shareholders are entitled to share equally in surplus assets in a winding up unless such rights are expressly taken away. The onus is on ordinary shareholders to show that the right of the preference shareholders has been cut down. To start with there is the fact that all shareholders are prima facie entitled to share in surplus assets in a winding up. It follows that the article must have been drafted with that right in mind, and, accordingly, it is not a proper inference that the article is exhaustive in its provisions, because the draftsman may have been relying on the basic rights of the shareholders. It is submitted that the decision in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (1) has not altered the law as laid down in *In re William Metcalfe & Son, Ltd.* (3) by placing the onus of establishing a right to share in surplus assets on preference shareholders. The result of that decision

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(1) [1949] A. C. 462.

(3) [1933] Ch. 142.

(2) 14 App. Cas. 525.

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is that there is now no onus. In each case it is a matter of construction. This case is different from that considered by the House of Lords. Here the preference stockholders have a majority of votes. It is impossible to suppose that they intended, when the articles were framed, to give up their right to share in surplus assets.

J. H. Brightman for the liquidator.

EVERSHED M.R. I will ask Wynn-Parry J. to deliver the first judgment.

WYNN-PARRY J. This is an appeal from the judgment of Roxburgh J. on an originating summons which raises the question how the surplus property of the company should be distributed as between the preference stockholders and the ordinary stockholders of the company in its liquidation. [His Lordship stated the facts and continued:] Roxburgh J. felt himself bound by authority and, with a reluctance which appears on the face of his judgment, was constrained to make a declaration to the effect that the holders of the preference stock were entitled to participate with the holders of the ordinary stock rateably in proportion to the nominal amount of the stocks held by them respectively in this sum. The two authorities which the judge mentions in his judgment are *In re Fraser and Chalmers Ltd.* (1) and *In re John Dry Steam Tugs Ltd.* (2). He does not in terms refer to *In re William Metcalfe & Sons Ltd.* (3), but it is plain that he must have had that case in mind, for it is a judgment of the Court of Appeal, and at the time when the present case was before him it was good authority.

In *In re William Metcalfe & Sons Ltd.* (3) the Court of Appeal, while accepting that each case must be regarded as one of construction turning on the terms of the particular document, approved the statement of Astbury J. in *In re Fraser and Chalmers Ltd.* (1), where he said that all shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares. He proceeded on the view that that was the correct principle to apply when considering the construction of articles or resolutions regulating the rights of classes of shareholders inter se. I think that the effect of *In re William Metcalfe & Sons Ltd.* (3) can, stated shortly,

(1) [1919] 2 Ch. 114.

(3) [1933] Ch. 142.

(2) [1932] 1 Ch. 594.

be said to be that, in questions between preference shareholders and ordinary shareholders as to the right of the preference shareholders to share in what has been many times described as surplus assets, the onus of showing that the preference shareholders are not entitled to share in those surplus assets lies upon the ordinary shareholders.

Since the matter was before Roxburgh J., the position has been materially altered by the decision of the House of Lords in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (1). For the purposes of the present case I do not think that it is necessary to embark upon a detailed analysis of that case or the opinions of the members of the House of Lords who heard it; but, as appears from the head-note, the facts were that the colliery assets of a coalmining company had been transferred to the National Coal Board under the Coal Industry Nationalisation Act, 1946, and that in consequence it was the intention of the company to go into voluntary liquidation. Meanwhile the company proposed to reduce its capital by returning their capital to the holders of the preference stock, which would be thereby extinguished. The reduction was opposed by certain preference stockholders on the ground, inter alia, that it deprived them of the right to participate in the liquidation and the division of the company's surplus assets. It was held by Viscount Maugham, Lord Simonds and Lord Normand, Lord Morton of Henryton dissenting, "that the proposed reduction was not unfair or inequitable and should be confirmed, because, even without it, the preference stockholders would not be entitled in a winding up to share in the surplus assets or to receive more than a return of their paid-up capital. Accordingly, they could not object to being paid, by means of the reduction, the amount which they would receive in the proposed liquidation."

For reasons which I shall endeavour to show, it appears to me that the effect of the decision of the majority in that case is not merely to remove the onus in cases such as this from the holders of ordinary shares, but to throw the onus upon the holders of preference shares; and it is for the holders of preference shares to satisfy the court that, on the true construction of the particular document, they are entitled to share in the surplus assets, at any rate in a case where a right to participate in surplus assets in a liquidation is conferred on the holders of preference shares.

(1) [1949] A. C. 462.

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Perhaps the point emerges most clearly from the speech of Lord Normand (1), where he quotes from the speech of Lord Haldane L.C. in *Will v. United Lankat Plantations Co. Ltd.* (2). Lord Normand said, quoting the Lord Chancellor: "Shares are not issued in the abstract and priorities are then attached to them; the issue of shares and the attachment of priorities proceed uno flatu; and when you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue." With this opinion Earl Loreburn and Lord Atkinson agreed. My Lords, the ratio decidendi applies with equal force to priorities of participation in the company's property, and I see no ground on which it may be supposed that the declaration of rights as regards dividends is exhaustive, but the declaration of rights as regards property is not exhaustive. There is as good reason and it is equally easy to define exhaustively the one set of rights as the other. Sargant J. in *In re National Telephone Co.* (3) said: "... it appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding up, the express gift or attachment of preferential rights to preferential shares, on their creation, is, prima facie, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled." The decision of this House in *Will v. United Lankat Plantations Co. Ltd.* (4) had not been pronounced when Sargant J. decided *In re National Telephone Co.* (5), and his opinion reflects his construction of the judgment of the Court of Appeal."

In my view, it follows from what I have read that Lord Normand considered that the same principle applies to the construction of rights in a winding up as applies to the construction of dividend rights, and that he approved the extract from the judgment of Sargant J. in *In re National Telephone Co. Ltd.* (5), which he cites. It is, therefore, I think, plain from consideration of what I have read from Lord Normand's speech that he takes the view, and expresses it, that the onus in such a case as this lies on the holders of preference shares.

(1) [1949] A. C. 462, 496.

(4) [1914] A. C. 11.

(2) [1914] A. C. 11, 17.

(5) [1914] 1 Ch. 755.

(3) [1914] 1 Ch. 755, 774.

I think that the same view is, in effect, expressed both by Viscount Maugham and by Lord Simonds, the other members of the majority. Viscount Maugham said (1): "Much reliance is placed on behalf of the appellants on the case of *In re William Metcalfe & Sons Ltd.* (2). I must say that in my opinion that case was wrongly decided; and it should be noted that it is expressly stated (3) that the bulk of the sum of 21,000*l.* there in dispute was attributable to accumulated profits. It seems to me difficult to reconcile that case with the decision of this House in *Will v. United Lankat Plantations Co. Ltd.* (4), and impossible to reconcile it on sound grounds with the decision of *In re Bridgewater Navigation Co.* (5)." It appears to me from that statement of Viscount Maugham that he could not reconcile the decision in *In re William Metcalfe & Sons Ltd.* (2) with the decision of the House of Lords in *Will v. United Lankat Plantations Co. Ltd.* (4), and that he was ranging himself on the same side as Lord Normand in taking the view that the onus in such cases is upon the holders of preference shares.

Lord Simonds, having discussed the relevant words in the relevant article in that case, said (6): "I do not ignore that in the same case"—that is *Will v. United Lankat Plantations Co. Ltd.* (7)—"in the Court of Appeal the distinction between dividend and capital was expressly made by both Lord Cezens-Hardy M.R. and Farwell L.J., and that in *In re William Metcalfe & Sons Ltd.* (2), Romer L.J. reasserted it. But I share the difficulty, which Lord Keith has expressed in this case (8), in reconciling the reasoning that lies behind the judgment in *Will's* case (4) and *In re William Metcalfe & Sons Ltd.* (2) respectively." He proceeds: "In *Collaroy Co. Ltd. v. Giffard* (10) Astbury J., after reviewing the authorities, including his own earlier decision in *In re Fraser and Chalmers* (9), said 'But whether the considerations affecting them (scilicet capital and dividend preference respectively) are entirely different' is a question of 'some difficulty,' and approved the proposition there urged by the ordinary shareholders that a fixed return of capital to shareholders in a winding up is just as artificial as a

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(1) [1949] A. C. 462, 482.

(6) [1949] A. C. 462, 489.

(2) [1933] Ch. 142.

(7) [1912] 2 Ch. 571.

(3) [1933] Ch. 142, 143.

(8) 1948 S. C. 363, 374.

(4) [1914] A. C. 11.

(9) [1919] 2 Ch. 114, 120.

(5) [1891] 2 Ch. 317.

(10) [1928] Ch. 144, 155.

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" provision for a fixed dividend and that, if the latter is regarded
" as exhaustive, there is no prima facie reason why the former
" should not be similarly regarded."

It was urged upon us that the true rule is to be found in the language of Lord Macnaghten in *Birch v. Cropper* (1). Mr. Gray, on behalf of the preference stockholder, who in effect represents all the holders of preference stock, read a passage from Lord Macnaghten's speech which is as follows: " Every
" person who becomes a member of a company limited by
" shares of equal amount becomes entitled to a proportionate
" part in the capital of the company, and, unless it be
" otherwise provided by the regulations of the company,
" entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including
" its uncalled capital. He is liable in respect of all moneys
" unpaid on his shares to pay up every call that is duly made
" upon him. But he does not by such payment acquire any
" further or other interest in the capital of the company.
" His share in the capital is just what it was before. His
" liability to the company is diminished by the amount paid.
" His contribution is merged in the common fund. And that
" is all."

That passage proceeds over the next three pages, ending with these words (2): " There was an express bargain made
" as to their rights in respect of profits arising from the
" business of the company. But there was no bargain—no
" provision of any sort—affecting their rights as shareholders
" in the capital of the company." So that, both at the beginning and at the end of the passage relied on, there is this vital qualification, that the rule which was stated by Lord Macnaghten only applies if the articles are silent as to any right in the preference shareholders to participate in surplus assets.

That rule, as it appears to me, is in no way impinged upon by the later cases, and in particular by the case of *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (3). And indeed Lord Simonds, in a passage which I shall read, brings the statement by Lord Macnaghten in *Birch v. Cropper* (2) into true perspective in the light of the subsequent authorities. He says (4): " Finally on this part of the case I ought to deal

(1) 14 App. Cas. 525, 543.

(3) [1949] A. C. 462.

(2) Ibid. 546.

(4) Ibid. 490.

“ with an observation made by Lord Macnaghten in *Birch v. Cropper* (1), upon which counsel for the appellants relied. “ ‘ They,’ he said, ‘ [scilicet the preference shareholders] “ ‘ must be treated as having all the rights of shareholders, “ ‘ except so far as they renounced these rights on their “ ‘ admission to the company.’ But in my opinion, Lord “ Macnaghten can have meant nothing more than that the “ rights of the parties depended on the bargain that they had “ made and that the terms of the bargain must be ascertained “ by a consideration of the articles of association and any “ other relevant document, a task which I have endeavoured “ in this case to discharge. [I cannot think that Lord “ Macnaghten intended to introduce some new principle of “ construction and to lay down that preference shareholders “ are entitled to share in surplus assets unless they expressly “ and specifically renounce that right.] ”

Having regard to the view which I take of the opinions of the majority of the House of Lords in the *Scottish Insurance Corporation* case (2), it appears to me to be unnecessary to embark upon any review of the earlier authorities, all of which were considered in that case; and in my judgment the effect of the authorities as now in force is to establish the two principles for which Mr. Christie contended: first, that, in construing an article which deals with rights to share in profits, that is, dividend rights, and rights to share in the company’s property in a liquidation, the same principle is applicable; and, second, that that principle is that, where the article sets out the rights attached to a class of shares to participate in profits while the company is a going concern or to share in the property of the company in liquidation, prima facie, the rights so set out are in each case exhaustive.

With those considerations in mind I turn back to art. 3 of the articles of association in this case. As regards the rights as to profits, the whole of the distributable profits are expressly dealt with. They are to be applied first in paying to the holders of the preference stock “ a fixed cumulative preferential “ dividend at the rate of 6 per cent. per annum on the amounts “ for the time being paid up or credited as paid up thereon “ respectively in priority to the ordinary shares,” and, secondly, in paying a non-cumulative dividend at the rate of 6 per cent. a year calculated on the same basis to the holders of the ordinary shares; and the balance is then distributable between

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(1) 14 App. Cas. 525, 546.

(2) [1949] A. C. 462.

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the two classes of shares *pari passu*. Nothing could be more plainly exhaustive than that language. Then, as regards the rights in a winding-up, the holders of the preference shares are stated to be entitled to certain payments in priority to the ordinary shares. [Those payments are, first of all, repayment of the capital paid up on the preference stock, and, second, any arrears of dividend whether earned or not. The question, then, is: is there anything to suggest that the language regarding the rights of the holders of the preference stock in a winding-up is not exhaustive? I can find nothing.] The onus now, as I have said, is in my view on the holders of the preference stock to show that the provision is not exhaustive; and in my view they have failed to discharge that onus.

There is present in this case a circumstance which, in my judgment, makes that conclusion a *fortiori*, namely, the express right conferred on the holders of the preference stock while the company remains a going concern to participate in the profits remaining after providing for the fixed non-cumulative dividend on the ordinary stock. A somewhat similar provision was contained in the articles of association of the National Telephone Co. which Sargant J. had to construe in the case of that name (1). The relevant article, which was introduced by a resolution, was as follows (1):

“ That the capital of the company be increased by the issue
“ of 15,000 new shares of 10*l.* each. That such shares be
“ called second preference shares, and that the holders thereof
“ (subject to the payment of the preferential dividend of the
“ original preference shares) be entitled to a cumulative
“ preferential dividend at the rate of 6 per cent. per annum.
“ After the ordinary shares have received a dividend at the
“ rate of 6 per cent. per annum out of the profits of each year,
“ the second preference shares and the ordinary shares shall
“ participate rateably, according to the amounts paid up
“ thereon, in any surplus profits. The second preference
“ shares shall not confer any right of voting at any general
“ meeting of the company, and, in the event of the company
“ being wound up, the surplus assets thereof shall be applied
“ in the first place in repaying to the holders of the original
“ preference shares the full amount paid up thereon, and,
“ subject thereto, in repaying to the holders of the second
“ preference shares the full amount paid up thereon, in priority

"to any payment in respect of the ordinary shares of the "company." So that it will be seen that in almost every material respect art. 3 in this case is comparable with the provision which I have just read.

On that Sargant J. says this (1) : "The question upon that "clause, as in the previous case, is whether there is an implied "negating of any right on the part of the holders of the "second preference shares to receive more in the winding up "of the company than the repayment of the whole of their "capital. In my opinion there is. I am speaking now, on "first impression, on my own construction of these articles, "apart from authority, which I shall allude to hereafter. "In my judgment the fact that an express right was given, "in respect of dividend, to receive more than the amount "of the preferential dividends in certain events strengthens "the inference that the silence as regards return of capital in "a winding-up indicates that there was to be no return of "capital beyond the return of the nominal amount of the "capital of the shares. I should have felt disposed to come "to that conclusion even without the assistance to be derived "from a consideration of the terms of the rights to dividend, "but with that assistance it seems to me that any business "man reading that resolution would come to the conclusion "that the holders of the second preference shares were not "entitled on a winding-up to get more than their return of "capital."

I accept entirely the proposition, as indeed one is directed to do throughout the authorities, that each case must, in the end, be a question of construction of the particular document in question, and it can be but infrequently that in the construction of a particular document one obtains such almost direct aid in that construction as I obtain in this case from the remarks of Sargant J. which I have just quoted. In my humble opinion they are good sense, and I would apply them in their full force to the art. 3 before the court in this case.

It was urged on us that in construing art. 3 we must have regard to the whole of the articles of association and to the surrounding circumstances. I accept that. It was urged on us that a relevant circumstance was that in this case the voting control rests in the hands of the holders of the preference stock; and from that it was sought to be argued that it is really impossible to conclude that the holders of the preference

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(1) [1914] 1 Ch. 755, 769.

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stock, the controllers of the company, should have contemplated that in a liquidation they would get no more than any arrears of dividend on their preference stock, together with the capital on it. I am unable to accept that argument. It involves speculation and therefore uncertainty. The bargain as regards rights of participation, whether in profits or assets, appears to me to be contained in art. 3. Nor can I find any context affecting the construction of that article to be derived from any other article in the articles of association. Finally, it was urged on us that we ought to have regard to the state of the law as it existed when the articles were adopted in the year 1929, and that the relevant art. 3 should be construed in the light of the law as then obtaining. There might—I say no more—perhaps have been some force in that argument had *In re William Metcalfe & Sons Ltd.* (1) been decided before the adoption of these articles; but the argument appears to me to be completely without weight when one considers what was the position of the law on this point in the year 1929. It is, I think, sufficient to say that there was then a conflict of judicial opinion on this point, which was only resolved, and then only for the time being, by the decision of the Court of Appeal in *In re William Metcalfe & Sons Ltd.* (1). For these reasons I would allow this appeal.

ASQUITH L.J. I agree.

EVERSHED M.R. I also agree. At the end of his judgment Roxburgh J. stated his conclusion thus: "It is quite clear that if, on a fair construction of the article, I cannot find that the preference shareholders are excluded from participation in the surplus assets, then they are entitled to participate." That conclusion was based on the decision of this court in *In re William Metcalfe & Sons Ltd.* (1), which governed this case when it was before Roxburgh J. Since then the law has been substantially affected by the decision of the House of Lords in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (2). In those circumstances I shall not be thought disrespectful to the judge if I do not state at length the reasons for taking a view different from that which he reached. I agree with my brother Wynn-Parry that, as a result of *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.* (2), the two propositions for

(1) [1933] Ch. 142.

(2) [1949] A. C. 462.

which Mr. Christie contended should now be taken as established.

Out of respect, however, for the careful and forceful argument of Mr. Gray, I will state in a few sentences why I reach that conclusion. At the end of his speech dealing with this point in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.*, Lord Normand said (1) : " It is, I think, " not possible to distinguish *Metcalfe's* case (2) from the " present case, and I have therefore come to the conclusion " that it should be overruled and that the ratio of *Will v. " United Lankat Plantations Co. Ltd.* (3) was correctly applied " in *Collaroy Co. Ltd. v. Giffard* (4) and *In re National Telephone " Co. Ltd.* (5)." It is true, as Mr. Gray has pointed out, that the language of Lord Normand in this respect is perhaps somewhat less qualified than the language which fell from Viscount Maugham and Lord Simonds on the same matter. But the disapprobation which both Viscount Maugham and Lord Simonds expressed for *In re William Metcalfe & Sons Ltd.* (2) is found in a context in which reference was made to the fact that Lord Keith in the Court of Session had found it impossible to reconcile *Will v. United Lankat Plantations Co. Ltd.* (3) and *Metcalfe's* case (2). It seems to me, therefore, that the result of the majority speeches is to treat as established and as good law the statement of Sargant J. in *In re National Telephone Co. Ltd.* (5), which Wynn-Parry J. has read, and to do so notwithstanding any observations of Lord Macnaghten in *Birch v. Cropper* (6), which must be construed as applicable only to the case where the articles are wholly silent as regards particular or specific rights.

I think, for myself, that during the sixty years which have passed since *Birch v. Cropper* (6) was before the House of Lords the view of the courts may have undergone some change in regard to the relative rights of preference and ordinary shareholders, and to the disadvantage of the preference shareholders, whose position has, in that interval of time, become somewhat more approximated to the role which Sir Horace Davey attempted to assign to them, but which Lord Macnaghten rejected in *Birch v. Cropper* (6), namely, that of debentureholders.

(1) [1949] A. C. 462, 497.

(2) [1933] Ch. 142.

(3) [1914] A. C. 11.

(4) [1928] Ch. 144.

(5) [1914] 1 Ch. 755.

(6) 14 App. Cas. 525.

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In his dissenting opinion in *Scottish Insurance Corporation Ltd. v. Wilsons & Clyde Coal Co. Ltd.*, Lord Morton of Henryton, after citing a passage from Lord Macnaghten's speech in *Birch v. Cropper* (1), based this conclusion upon it (2): "Thus in the present case the preference stockholders are "entitled to share in the surplus assets with the ordinary "stockholders in proportion to their respective holdings, "unless the articles of the company otherwise provide." But that view and that interpretation of Lord Macnaghten's speech were rejected by the majority of the House of Lords. It is the duty of the Court of Appeal to follow loyally the result and not to seek by minute analysis to perceive fine distinctions between the opinions of the concurring Lords, more especially when the effect might be to produce a condition of perhaps inconvenient uncertainty.

I therefore on the point of law conclude that, after the *Wilsons & Clyde* case (3), the onus is, so to speak, on the preference stockholders. It is, of course, quite true that the matter in the last resort is one of the construction of the articles. For reasons which Wynn-Parry J. has already stated, and with which I agree, I think that the onus has not been discharged. It is true that this case possesses in some respects notable features: for example, the facts that the preference shareholders have a majority of the voting powers and that they have at the end of art. 3 a position in regard to reduction of capital which is (I agree with Wynn-Parry J.) unique in my experience; nor do I forget that they are given earlier in the article a right to participate with the ordinary shareholders in surplus profits. But I cannot come, on any of those matters or on all of them together, to a conclusion which would discharge the onus placed upon the preference stockholders, even if (without saying that it is right to do so) regard is had to the state of the law as it was thought to be when the article was first adopted.

I think that there may be this further difficulty: Mr. Gray said that one would expect to find some kind of parallelism between the rights inter se of the preference shareholders and the ordinary shareholders as to dividend and their rights inter se in a winding up. Having regard to the nature of the right of participation, it would, I think, be difficult to reproduce a true parallel between the two classes in a winding up and still more difficult to read into the

(1) 14 App. Cas. 525.

(3) [1949] A. C. 462.

(2) [1949] A. C. 462, 501.

provisions of the article appropriate language to produce such a result. Even if one did, one would still be left with some anomaly having regard to the rights on a reduction of capital.

I think, for these reasons as well as those that have already been stated, that this appeal should be allowed, and that the appropriate declarations should be to the effect that the surplus assets are now distributable exclusively among the ordinary shareholders.

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Appeal allowed.

Solicitors: *Stock and Slater; Peacock and Goddard, for Parker, Son and Nickson, High Wycombe; Ashurst, Morris Crisp & Co.*

B. A. B.

Considered. *In re*
SCARISBRICK
[1950] 1 Ch. 226

Applied. *In re*
COULTHURST
[1951] 1 Ch. 193

Applied. *In re*
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[1951] 1 Ch. 661

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Nov. 14, 15.

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Asquith L.J.
and
Wynn-Parry J.

[1948. G. 4785]

Charity—Trust for company's "necessitous" employees and ex-employees and for dependants of such beneficiaries living or dead—Valid charitable trust.

By a deed dated April 14, 1918, a company vested a fund, derived solely from its profits, in trustees to be applied at the discretion of its London board of directors for granting gratuities, pensions or allowances to persons "who are or shall be necessitous" and deserving and who for the time being are or have been "in the company's employ . . . and the wives, widows, husbands, widowers, children, parents and other dependants" of any person who for the time being is or would if living have "been himself or herself a member of the class of beneficiaries." The deed contained a later clause giving the board power to "rescind, alter or modify" the provisions of the deed when empowered to do so by special resolution. In 1948 the fund consisted of 105,000*l.*, only sixteen persons were receiving benefit from it, and claims upon it seemed likely to diminish. On August 26, 1948, the board, under the authority of a special resolution, executed a deed declaring that the fund was held in trust for the company free from the trusts of the deed of 1918 and rescinding the latter deed. The trustees issued a summons asking whether under the deed of 1918 the fund was held upon a valid charitable trust, and, if so, whether there was a right in the company to rescind that deed.

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Held (1.), that in ascertaining the class to benefit from the fund the word "and" in the expression "and the wives, etc." must be read as "or who are" and that so read the trusts were clearly for the relief of poverty; and (2.), that, even if the power of revocation were valid, the class of beneficiaries could not be treated as including in addition to those set out in the deed such other persons as might from time to time be specified by the company: *In re Sir Robert Peel's School at Tamworth* (1868) L. R. 3 Ch. 543, applied.

Decision of Harman J. [1949] Ch. 572, approved.

Held, further, (3.) that the trust, being for the relief of poverty amongst the employees and ex-employees of a company and their families, was a charity, and that accordingly the deed of 1918 had established a valid charitable trust. Unreported decision of the Court of Appeal in *In re Sir Robert Laidlaw* 1935, followed. *Spiller v. Maudé* (1881) 32 Ch. D. 158; *In re Gosling* (1900) 48 W. R. 300; *In re Buck* [1896] 2 Ch. 727, considered; (4.) but that in construing the deed of 1918 the court was entitled to have regard to the power of revocation; that that provision, read together with the other provisions of the deed, did not show any general charitable intention; and that accordingly, in so far as the trust funds were not required for carrying out the trusts imposed by the deed, they were not to be applied cy-près for other charitable objects, but reverted by way of resulting trust to the company. *In re Peel's Release* [1921] 2 Ch. 218, considered. *In re Talbot* [1933] Ch. 895, applied.

Decision of Harman J. on this point reversed.

APPEAL from Harman J. (1).

South American Stores (Gath and Chaves) Ltd., which was incorporated in 1912, conducted a chain of stores in the Argentine Republic and had an English subsidiary operating in Chile and local subsidiaries incorporated in Chile and France. Its board sat in London. By art. 134 of the articles of association, 2 per cent. of its profits were to be set aside for the "Employees' Savings and Insurance Fund," an object amended in 1916 to "Employees' Health and Relief Fund." On April 14, 1918, the board executed a deed vesting the fund (then of about 21,000*l.*) in trustees and declaring by cl. 3 that it was to be used for granting, at the discretion of the board, gratuities, pensions or allowances to beneficiaries. By cl. 4 it was declared that the class of beneficiaries included "all persons who, in the opinion of the London board, are or shall be necessitous and deserving and who for the time being are or have been in the company's employ or in the employ of any agents of the company or in the employ of Gath and Chaves Sociedad Anonima" [a sub-

(1) [1949] Ch. 572.

subsidiary company] " and the wives, widows, husbands, widowers, children, parents and other dependants of any person who for the time being is or would, if living, have been himself or herself a member of the class of beneficiaries." By cl. 15 the company was empowered to " rescind, alter or modify " the provisions of the deed by special resolution.

Since April, 1918, the fund (with which a fund held under a similar deed by a subsidiary company in Chile was amalgamated in 1938) had been administered in accordance with cll. 3 and 4 of the deed. In 1948, when the company had about 5,000 employees and the fund stood at about 105,000*l.*, sixteen persons only were receiving benefits it. The calls on it were much less than its income, and the company had put a contributory pension scheme into operation and intended to establish a non-contributory scheme as well. Accordingly, on August 4, 1948, the company so amended art. 134 as to preclude any further payments into the fund, and thereafter, purporting to act under cl. 15 of the deed of 1918, authorized the board to execute a deed dated August 26, 1948, declaring that the fund was held in trust for the company free from the trusts of the 1918 deed, and rescinding that deed. The trustees issued a summons asking (a) whether under the deed of 1918 the fund was held on a valid charitable trust ; and (b) if so, whether there was a right in the company to rescind that deed.

Harman J. held (1.) that the trust was for the relief of poverty and that the class of beneficiaries was, for the purposes of such a trust, wide enough to constitute the public element needed in such a case for the fund to be held on a valid charitable trust ; and (2.) that the company had no power to withdraw funds unconditionally devoted to such an object by the company out of its profits.

The company appealed.

Milner Holland K.C. and *E. Blanshard Stamp* for the company. The fund consisting of 2 per cent. of the company's profits is not devoted to charitable purposes by the deed of April 14, 1918. Clause 3 tells what is to be done with the fund, namely, to apply it, at the discretion of the board, for granting gratuities, pensions and allowances to beneficiaries. The trustees really have no power at all, but have to apply the fund as directed by the body executing the deed. There cannot be said to be any other trust or obligation which binds

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the trustees. The London board keeps complete control, and in addition reserves the power in cl. 15 to "rescind, alter or "modify" the deed. It is very possible that the power of revocation offends the rule against perpetuities, but in construing the deed regard must be had to cl. 15 and the rule against perpetuities only be applied afterwards: compare Farwell on Powers (3rd ed.), p. 332. The question is not whether the trustees may apply the fund to strictly charitable purposes, but whether they are bound to do so. Short of that there is no charitable trust. There are two grounds for saying that on the construction of the deed no charitable trust was created: (1.) that no intention was shown to do so, and (2.) that in any case the beneficiaries are persons who in the opinion of the London board satisfy certain requisites.

[EVERSHED M.R.: The beneficiaries must be necessitous and deserving.]

The fact, however, that power to "rescind, alter or "modify" that deed is conferred by cl. 15 means that each clause must be read subject to this power, so that the class in cl. 4 must be treated as having added to it, "or "such other persons as the board shall decide." In any case there is no need for all the persons specified in cl. 4 to be necessitous. Included in cl. 4 are the various dependants of a person who, if living, would belong to a class and be necessitous. But there is nothing requiring the dependants to be necessitous. The court must construe the words of cl. 4 as they stand.

Pascoe Hayward K.C. and *Raymond Walton* for the defendant, an object of the trust in receipt of benefit from the fund. The two questions of construction are: (1.) is the deed a declaration of trust? And (2.) if so, are the trusts for necessitous persons only? For these to be a valid charity both questions must be answered in the affirmative, and that will leave yet a further question to be answered. In regard to (1.) it had been argued that the trustees had none of the usual powers of trustees and that the exercise of these was in the control of the company. If that was the intention, why was the deed executed and trustees appointed? The court must approach the deed in the expectation that an alteration is being made in the absolute rights and control of the company and that, in fact, the fund has passed into the hands of persons called trustees. Any ambiguity is resolved on a scrutiny of the trusts declared; and it is to be noted that cl. 11 provides for the trustees' remun-

eration for acting as trustees and that cl. 13 deals with the costs, charges and expenses of administering the trusts. It is clear, then, that the trustees had the fund vested in them and that they were to administer it. Even the power of revocation in cl. 15 indicates that meanwhile there are trusts on foot.

As to (2.) it is clear that the beneficiaries must be necessitous persons.

[EVERSHED M.R. : I am particularly troubled about the third class of beneficiaries in cl. 4 consisting of "wives, widows, husbands, widowers, etc."]

The language of cl. 4 should be widely construed as meaning that all persons specified as beneficiaries must be "necessitous and deserving." The third class really consists of dependants and that in itself suggests that they are persons in need of help.

[EVERSHED M.R. : Is the husband of a wife employed by the company a dependant ?]

The word "dependants" must not be applied strictly. It is suggested that poverty runs through the whole class.

[WYNN-PARRY J. : The word "and" before "wives, widows, etc.," could be read as "or who are."]

Yes : and so read all the third group must be necessitous and deserving. Again, the contention that cl. 15 can be read into cl. 4 to enlarge the trusts is wrong. *In re Peel's Release* (1) shows that a power to revoke is void if given for an indefinite period. The class in cl. 4 cannot be altered by an invalid provision in cl. 15. See also *In re Sir Robert Peel's School at Tamworth* (2).

Denys Buckley for the Attorney-General adopted *Hayward K.C.*'s arguments.

Lindner for the trustees.

Milner Holland K.C. replied.

EVERSHED M.R. : This case comes to the court on appeal from Harman J., and it raises at least two distinct points : (1.) A question of construction of the deed which is the subject matter of the action, and (2.) a question of general law, the rule in regard to public character in its application to charities for the relief of poverty. Having heard Mr. Milner Holland's opening argument for the company on the first point, we called on Mr. Pascoe Hayward, and heard argument from the defendant. Since we have all reached a clear conclusion

(1) [1921] 2 Ch. 218, 225.

(2) (1868) L. R. 3 Ch. 543, 549.

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on this question, it has seemed that it would be convenient to dispose of it at once, particularly since, on the view which I take, the judgment of the judge is correct.

The deed to which I have already referred was made on April 14, 1918, between South American Stores (Gath and Chaves) Ltd. of the one part, and two persons described as, and thereafter called, the trustees, of the other part. Before turning to the language of the deed, it is right that I should make a brief reference to certain earlier facts, part of the history of the case. The company is one which ever since its incorporation in the year 1912 had thought it proper, as it was indeed generous, to make provision for its servants. For the first six years of the company's existence the form which the provision took under its articles of association was the setting aside of a percentage of its profits to a fund called at first "Employees' Savings and Insurance Fund," and later "Employees' Help and Relief Fund." When the document of 1918 came to be executed, the sums so set aside amounted to a figure of 21,000*l.* or thereabouts. It is, I think, clear, and it is conceded, that up to the date of this document, notwithstanding the labels attached from time to time to the fund, it remained part of the company's own property and would have been available, if the worst had come to the worst, for the company's creditors. Mr. Milner Holland has invited us to form the view that, on its proper construction, the deed of 1918 did not alter that substantial result, but I cannot accept that argument. The first question, indeed, which Mr. Milner Holland has posed, is this: was the document of 1918 one which effectively created any trusts at all? On that point, I confess, I feel, and have felt, little difficulty. The third recital to the document, the parties to which I have already described, was in this form: "And whereas it is considered expedient "to define and declare the trusts upon which the fund"—that is the accumulated 21,000*l.*—"is and shall be held and "the terms upon which the same is being and shall be "administered." It is quite true that very many of the discretions which would normally be found vested in the trustees are in fact, under the terms of this deed, exercisable by the board of directors of the London company; but that still leaves in my mind no doubt that this document did create and establish trusts as it certainly stated that it did. I do not propose on this point, with all respect to Mr. Milner Holland,

to travel through the document. Suffice it to say that by cl. 3 it was provided that the fund "shall both as to capital and income and accumulations of income be used and applied" as therein set forth, and that other clauses, such as cl. 11 and cl. 13, contain provisions which in terms put it to my mind almost beyond argument that this document did create a trust.

That leaves for solution a second and more difficult question: what was the nature of the trust which it created. Was it a charitable trust? I want at this stage to guard myself in two respects: I have already indicated that there remains still for our consideration a substantial problem of law, namely whether the requirement of public interest is applicable to the same extent in the case of charities for the relief of poverty as it is in other cases. In posing the question "did this document, according to its construction, constitute a charitable trust?" I am assuming that the charitable nature is not defeated by the fact that the class to be benefited is one defined by reference to service in a company, or series of companies. There is a second reservation which I must make: it is possible that the charitable trusts were, on their proper interpretation, confined to the specific purposes described in the deed, without there being any general charitable intention. I have to make that reservation, because on the evidence, as we are informed, it now appears that the objects stated, assuming them to be charitable within the phrase which I have hitherto used, are not sufficiently numerous to exhaust the uses to which the fund can be put; and it was on that ground that the judge, having decided adversely to the company directed application *cy-près*.

I want at this stage to keep that matter open. I think that it would be more accurate to express the question to which I am about to apply myself in the following terms: what was the precise nature of the trust which was declared by the document? I should finally interpolate that this question has arisen because the company desires, in exercise of a power expressly reserved to it by cl. 15 of the deed, to revoke these trusts, not, it must be said in all fairness to the company, in order to appropriate to itself and the shareholders the 21,000*l.*, or the much greater figure which is, or was at the date of revocation, in the names of the trustees, but because it is thought that a more appropriate provision can be made in other ways for the servants of the company. The technical question arises whether it can, in the circumstances, do this.

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The most material clauses of the deed for present purposes, are cl. 3 and 4. Clause 3 is as follows: "The fund shall both as to capital and income and accumulations of income be used and applied at such times and in such manner in all respects for the benefit of such members of the class of beneficiaries hereinafter designated as the London board shall from time to time direct and without prejudice to the generality of the discretion intended to be hereby reposed in the London board) may be used and applied in or towards the granting of gratuities, pensions or allowances of such respective amounts to be paid to such persons (being members of the said class of beneficiaries) upon such terms and subject to such conditions as the London board shall from time to time think proper to prescribe." That clause indicates that the definition of the class of beneficiaries will follow, but it is, I think, plain that the beneficiaries under the trust are to be persons selected—true it is, selected by the London board; but nevertheless selected—from the class of beneficiaries to be later defined. Having read it, I wish to draw attention to the fact that, although it is expressed to be without prejudice to the generality of the earlier discretion, the fund is to be used in the granting of gratuities, pensions or allowances; and that phrase, I observe, is also to be found in cl. 12. Clause 12 directs that, in the event of the liquidation of the company otherwise than by reconstruction, the fund shall then be distributed amongst the "members of the said class of beneficiaries, including members then in receipt of any gratuities, pensions, allowances or other benefits."

It is round cl. 4 that the argument before us has really ranged. It begins: "The class of beneficiaries for whose benefit the fund may be used or applied as aforesaid shall include." I pause there to dispose of one point: it was suggested that the use of the word "include" imported necessarily that the class of beneficiaries could extend to some much wider and unspecified class than that which is then next defined. I do not so read it. I think that "include" there means "cover." The clause proceeds: "shall include all persons who, in the opinion of the London board, are or shall be necessitous and deserving and who for the time being are or have been in the company's employ or the employ of any agents of the company or in the employ of Gath and Chaves Sociedad Anonima and the wives, widows, husbands, widowers,

“ children, parents and other dependants of any person who
“ for the time being is or would if living have been himself
“ or herself a member of the class of beneficiaries.”

It is not very difficult as a matter of English to criticize that clause. Most of the difficulty in practice has arisen from the last part of it. It is a matter of note that it uses the plural “ and the “ wives, widows, husbands,” etc., and then goes back to the singular, “ of any person,” which might be suggested to mean that the person had several wives. I only mention that to show that one has, I think, to approach this clause at any rate without any assumption that it is, as a matter of English and syntax, precisely, carefully or accurately drawn.

But the first point that arises—and I think that I can dispose of this quite briefly—is in regard to the effect of the words “ in the opinion of the London board.” It is said that they confer a discretion without limit, and that the result of this is that the class is not of people who are in truth necessitous and deserving, but of people whom the London board may—and, it is suggested, may by the most extravagant process of thought—regard as covered by those two words. I do not think that such an extended meaning can be given to that phrase. I think that the discretion is a fiduciary one. A member of the class may be both necessitous and deserving, but one can well imagine that difficulties might arise, for example, whether it could be said that a particular individual qualified under both heads. I take this provision to mean that in the event of doubt the opinion (which must be bona fide given in the exercise, as I say, of a fiduciary discretion) of the London board is to be taken as conclusive. I do not think, therefore, that that extends the class so as to make it cease to be a gift for the relief of poverty.

That qualification, however, is not the sole one. The persons must not only be necessitous and deserving in the opinion of the board, but also persons who are or have been in the company’s employ. To simplify the matter, I will leave out the reference to the agents of the company, or of the other South American company mentioned. So far, as it seems, there is no great difficulty. Then come the added words “ and the wives,” etc. As a matter of strict English, and if you can apply with any conscientiousness very strict rules of syntax to this sentence, the words “ and the wives ” seem to relate back to “ include all persons ”, so that the class would be, first, all persons who in the opinion of the London

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board are necessitous and are employees or ex-employees, and, secondly, the wives, widows, husbands, widowers, etc., of any person in the primary class, but without imposing on the wives, etc., the necessity of themselves being necessitous or deserving. That result, of course, would be surprising if it were right when the general scope and obvious purpose of this document are considered.

The difficulties do not end there : may the wife of a living employee herself be affluent though the employee must be within the class, that is to say, necessitous in the opinion of the board ? That, surely is, on the face of it, absurd. Further difficulties are presented, and I am not suggesting that I shall be able to find it necessary to try to solve them all ; but in the case of a deceased employee, if he is to be within the class, strictly it has to be postulated of him that he, if living, would have been necessitous. Again, it is very difficult to see how, with any pretence of accuracy, such a hypothesis can be handled, but the only test, one would suppose, which could have been intended was by reference to the conditions of the widow or other dependant whose circumstances were under consideration. I think myself that the emphasis in the words "himself or herself" adds to or tends towards what I think to be the right solution. The sentence is "of any person who for the time being is or would if living have been "himself or herself a member of the class," which means himself or herself *prima facie* necessitous and deserving. The whole tenor of this clause makes it clear to my mind that the intention was that the fund, in so far as it is not used for "employees or ex-employees", should be used for the relief of the necessitous condition of wives, etc. of employees, and ex-employees. Corroboration of that is to be found in the reference already made to gratuities, pensions or allowances as an indication in the deed of the kind of benefit contemplated. It is the sort of language that one would use to describe a benefit for the relief of necessitous circumstances.

What, then, is the solution ? To my mind it involves substituting for "and" the word "or." If that is done, it really will solve the difficulty. Written out more in full, I think that it should read "or who are the wives, etc." The words "who are" which have been used earlier, I think, might be imported even though the word "and" remains ; but it does the least violence to the language that for the word "and" should be read the slightly longer phrase "or who are."

I agree with Mr. Milner Holland that one should not start to construe this document with any prejudice or bias in favour of giving it a charitable effect, and I hope and believe that I have not done so. I think that, in order to give the document sensible effect, one must read those words in the way that I have suggested. In other words, I agree with and adopt what Harman J. says (1) : " In my judgment the class of beneficiaries defined in cl. 4 must all satisfy the requirement of being necessitous and deserving, that is to say that poverty is a necessary element to qualify a person for benefit. It was suggested to me that though employees or ex-employees must necessarily be poor yet that qualification did not extend to their dependants. I cannot so construe the deed. In my judgment dependants must be necessitous and deserving just as a member of the primary class of employees or ex-employees must himself or herself be." Out of respect for the argument I have dealt at greater length than did the judge with this point, but I think that that statement of his is correct, and I adopt it for the purposes of this judgment.

However there remains outstanding one further point : I have already said that there is at the end of this deed this power of revocation : " the company may at any time or times with the sanction of a special resolution of the company in general meeting rescind, alter or modify the provisions of these presents or any of them." It is said by Mr. Milner Holland that that must be read as being a qualification of each clause, and that, when the class of beneficiaries is defined in cl. 4, the effect is as though it read : " the class of beneficiaries shall include all persons therein named, or such other persons as might from time to time be specified by the company in general meeting." I do not myself think that that is the fair way to construe these clauses together. I think that cl. 15 is what it purports to be—a revocation clause ; and of course power to alter or rescind is power partially to revoke. I think it likely, it is not necessary to express a concluded opinion about it, that the clause would be and is invalid as offending against the rule against perpetuities, but I am content to assume for the purpose of this point that it is at the moment at any rate an operative clause, that is to say that the company could make use of it. Therefore, in considering this as a matter of construction, I will leave out of account for the moment the question of the invalidity of cl. 15 by reference to the rule against perpetuities.

(1) [1949] Ch. 572, 575.

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As I have indeed already indicated, I do not think that the clauses can be read together so as to make the gift one for a charitable class or some other class of persons to be specified thereafter. I think that that conclusion really follows from the judgments of this court in *In re Sir Robert Peel's School at Tamworth* (1). It is true that that case was primarily concerned with the powers of the Charity Commissioners, and with whether Sir Robert Peel, who at the material date was the sole trustee under the trust, was entitled to refuse to supply them with certain accounts in respect of the management of the school, and whether by so refusing he was guilty of contempt of court. For present purposes, however, the point emerges in this way: the father of Sir Robert Peel had established a fund for the support of a school at Tamworth for the education of poor boys in that town. Apparently the management was vested in the Sir Robert Peel concerned in the case as sole trustee at the material date. By a codicil, the father had provided that if the person responsible for the management (as it turned out Sir Robert Peel) should be dissatisfied with the management or discipline of the school, or should be of opinion that the school was not of public utility, or should for any reason desire to alter, vary and change the management, regulations, objects and purposes of the school, then Sir Robert Peel or any other managers should be at liberty to alter, vary or change the management, regulations, objects and purposes of the school, or to revoke or abolish and absolutely discontinue and dissolve the same entirely, and thereupon to appropriate, dispose of and apply the sum of money as he thought fit. In fact, Sir Robert Peel had not purported to exercise his powers, but it was argued on his behalf that the Charity Commissioners had no power to make the demands which they had made upon Sir Robert, because there was here no charity in truth. That point depended on the effect of this power of revocation which it was sought to use in the same way as Mr. Milner Holland has used cl. 15 here. I cannot put the point, or the answer to it, better than by reading one passage from the judgment of Sir William Page Wood (2): "Sir Roundell Palmer further argued that this, according to "*Morice v. Bishop of Durham* (3), was not a charity"—that is a reference to Mr. Romilly's definition of charities—"The

(1) L. R. 3 Ch. 543.

(2) Ibid. 549.

(3) (1805) 10 Ves. 521.

“ decision in that case turned upon the fact that the trusts
 “ declared were either for charitable objects or for other
 “ purposes, so that the court could not tell how much was
 “ intended for charitable objects, and therefore could not fix
 “ the property with charitable purposes at all. That cannot
 “ be applied to a case where the testator has definitely marked
 “ out the charitable purposes, and has not left it optional with
 “ the trustees to apply the fund for the charitable purposes,
 “ or for other purposes, but has directed them to apply it
 “ for the charitable purposes until the managing body of the
 “ charity think fit to revoke the trusts.”

It seems to me that that language, assuming as I do that cl. 15 is not wholly invalid, applies here. As I construe cll. 3 and 4, the company has directed the trustees to apply the fund for charitable purposes, and, making always the assumption that the purposes which I have defined are charitable, until the company by special resolution thinks fit to revoke those trusts. The fund has been dedicated to it, and in my judgment, therefore, it is not open, in view of that decision, to argue that the case must be treated as though there were here a direction to apply the fund for these charitable purposes, or for other purposes, and so bring the case within the disqualification to which Sir William Page Wood refers.

Deciding as I do that Harman J. was quite right in the conclusion to which he came on construction, we now have, after my brethren have delivered their judgment, to proceed to the problem of law which I have already indicated.

ASQUITH L.J. At one stage I was greatly impressed by the argument for the Company founded on the presence in the deed of cl. 15, but in my view a complete answer to that argument is afforded by the principle on which the court proceeded in *In re Sir Robert Peel's School at Tamworth* (1). I entirely agree with the conclusions that the Master of the Rolls has reached on the construction of this document, and with the reasoning on which those conclusions are formed.

WYNN-PARRY J. I agree. The question really is one of construction which has been most fully dealt with already, and I should only be guilty of unwelcome repetition if I were to add any conclusions of my own.

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(1) L. R. 3 Ch. 543, 549.

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The court, having thus decided what was the true construction of the deed of 1918, now proceeded to hear argument as to its legal effect.

Milner Holland K.C. and *E. Blanshard Stamp* for the company. The company's first contention is that the deed of 1918 does not create charitable trusts. There is no modern decision that relief of poverty is a public object. It is not reasonable to regard all gifts for the relief of poverty as having a public object. What may have been true 150 years ago, may not be true today. The effect of a gift on trust for the poor employees of a company was expressly left undecided in *In re Compton* (1). The poor-relation cases are anomolous, and the exception there laid down should not be extended to new classes of case: *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (2). There are no reported decisions directly in point. The report of *Spiller v. Maude* (3) leaves it uncertain whether Jessel M.R. had his attention drawn to any aspect of the matter but poverty. In *In re Gosling* (4) the question was what constituted a section of the public. In *In re Buck* (5) no argument was directed to the question whether the class of beneficiaries constituted a section of the public. Those three decisions influenced Harman J. They are not binding on this court. It appears that this question was considered by the Court of Appeal in *In re Sir Robert Laidlaw* (6), an unreported decision, where it was held that similar trusts for the benefit of poor employees of a company were valid charitable trusts. It does not appear that this question was argued on that appeal. Secondly, it is contended that, if the deed of 1918 creates a charitable trust, on its true construction there is no general charitable intention, and that, in so far as the trust property is not required for the original trust purpose, there is a resulting trust of the fund to the Company.

Denys Buckley for the Attorney-General. The deed of 1918 shows a general charitable intention. It is first submitted that if a fund is once devoted to charity upon trusts which it is contemplated will continue indefinitely and reverter is not contemplated in defined circumstances, there is a sufficient element of general charitable intention for the donor to have divested himself of the property, and no right of reverter

(1) [1945] Ch. 123.

(4) (1900) 48 W. R. 300.

(2) [1946] Ch. 194.

(5) [1896] 2 Ch. 727.

(3) (1881) 32 Ch. D. 158.

(6) 1935 Unreported.

remains in him. The power of revocation contained in this deed has no greater effect than the reverter clause in *In re Peel's Release* (1). It is submitted that, when there are no objects of this trust left in existence, the fund must be applied cy-près. [He referred to *Spiller v. Maude* (2)]. Secondly, it is submitted that in order to discover the true effect of the power of revocation, the earlier clauses of the deed must be first construed. Their effect is to create trusts which will continue indefinitely until the power of revocation is exercised. Prima facie this is a trust which is to continue indefinitely. The fact that the company reserved power of revocation outside the trusts, which cannot be exercised, means that the fund remains dedicated to a charitable object indefinitely.

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EVERSHED M.R.: At the end of the argument on the question of construction raised in this case the court expressed its conclusion, agreeing with the judge in the court below, that, putting it quite briefly and for present purposes I think sufficiently accurately, the trusts established in cls. 3 and 4 were limited to necessitous beneficiaries. That left as the next point for discussion what, it appeared, might well be a question of law of great difficulty and no little importance. The question may, I think, be put thus: under the law as it has now been established, and in the light of several recent decisions, both in this court and in the House of Lords, is a trust for a class of poor persons defined by reference to the fact that they are employed by some person, firm, or company, a good charitable trust, or does it fail of that qualification through the absence of the necessary public element?

There is, I think, no doubt that the emphasis which has been placed in recent years on the need for that public characteristic had to some degree been lost sight of in earlier cases, and its emphatic affirmation (the last case I have in mind is *Gilmour v. Coats* (3) in the House of Lords, undoubtedly raises the question whether certain decisions of courts of first instance on trusts in favour of poor persons of various categories are now consistent with the principles which have been stated.

In *In re Drummond* (4), Eve J. had to consider whether a trust established for the purpose of providing holidays for employees of a particular company was a good charitable trust, and he answered that question negatively, saying that

(1) [1921] 2 Ch. 218.

(3) [1949] A. C. 426.

(2) 32 Ch. D. 158.

(4) [1914] 2 Ch. 90.

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it was a trust not for the public or a section of the public, but for private individuals, albeit a fluctuating body of such individuals, but still private individuals. It is to be observed (and the point was, I think, expressed by the judge) that there was no poverty qualification in that case. In the absence, therefore, of poverty, the case appeared to decide that employees of a particular company were not a section of the community so as to give to a trust in their favour the necessary public quality. In the later case in this court of *In re Compton* (1), Lord Greene M.R., in what may be perhaps regarded now as a classic judgment, discussed fully this problem of public character, and *In re Drummond* (2) was expressly affirmed.* It must therefore now be taken to be concluded, so far as this court is concerned, that, where there is no poverty element, where there is no trust for the relief of poverty, the employees of a particular undertaking are not a section of the community, and a trust in their favour will not qualify as a charity.

The question, however, arises (which Mr. Milner Holland invited us to answer negatively): is the same true when the trust is one for the relief of poverty? It was apprehended, when the matter came before Harman J., that there had been no decision one way or the other previously on that problem. But there have been three cases at first instance in which that problem, or one sufficiently closely related to be regarded as the same problem, did arise. The first is *Spiller v. Maude* (3) reported in a note to *Pease v. Pattinson* (4). That was a decision of Sir George Jessel M.R., sitting at first instance, in which the class intended to be benefited were the members of a theatrical society established in the City of York. The second is *In re Gosling* (5), a decision of Byrne J., where the class was old and worn-out clerks of a banking firm. The third was *In re Buck* (6), a case determined by Kekewich J., where the class concerned were members of a certain friendly society and their dependants. Beyond doubt in each of those cases (and more particularly the second) the decisions appear to have involved the conclusion that the class of persons in question in each case did form a section of the public. It is, however, true that the emphasis may have been laid more upon the poverty

(1) [1945] Ch. 123.

(2) [1914] 2 Ch. 90.

(3) 32 Ch. D. 158.

(4) (1886) 32 Ch. D. 154.

(5) 48 W. R. 300.

(6) [1896] 2 Ch. 727.

element ; and Lord Greene M.R. said of the first of them in *In re Hobourn Aero Component Ld.'s Air Raid Distress Fund* (1) presently to be mentioned : " I must confess . . . that " this seems to me a very extreme decision, because the whole " arrangement was of a personal nature. However, it was " saved by the fact of poverty . . . " Had the point, which Mr. Milner Holland has raised in this case, been argued in the three cases which I have mentioned, as fully as it has been argued here, and had the judges concerned had the advantage of the guidance given by the later decisions, their decisions must have involved the question which is here involved, namely, whether the servants of the company in the present case form a section of the community, or whether, since this is a trust for the relief of poverty, it is not necessary that they should. X

I think that Mr. Milner Holland was perfectly entitled to say that, if those three cases are considered in the light of the observations of this court in *In re Compton* (2) and in the later case, in some ways more significant for present purposes, *In re Hobourn Aero Components Ld.* (1), there would at the very least be grounds for saying that they are inconsistent with those observations. I think also that this may fairly be added : in considering whether a trust is (within the somewhat technical meaning of the term) a charity, and as such entitled to enjoy the privileges in regard to income tax and in regard to the rule against perpetuities which charities enjoy, one may put to oneself as a commonsense matter the question : looking at this trust, and applying the ordinary usages of our language, is it a charity as ordinary men and women would understand it ? Putting that question in relation to this case, it might have been answered : no, this is a domestic affair of a particular company designed for the advantage and promotion of the interests of its own servants. There was obviously, on the authorities as I have so far stated them, a case, a serious and substantial case for the consideration both of this court and of Harman J. whether this trust was charitable. }

The matter was determined in this way by Harman J. Faced as he was on the one hand with the decisions in regard to poor relations, properly so called, and also with the three cases to which I have alluded, *Spiller v. Maude* (3), *In re Gosling* (4)

(1) [1946] Ch. 194, 205.

(3) 32 Ch. D. 158.

(2) [1945] Ch. 123.

(4) 48 W. R. 300.

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and *In re Buck* (1), and, on the other hand, with the emphatic insistence on the need for the public element, and *In re Drummond* (2), the judge concluded that consistency could only be achieved by treating the relief of poverty as in itself supplying the necessary public element. The judge said this (3): "It seems to me a public object is always necessary to make a trust legally charitable and that the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories."

Proceeding from that statement of principle, and after referring to the three cases at first instance which I have already mentioned, the judge came to the conclusion that there was here a charitable object, in other words, that this trust was a charitable trust. Mr. Milner Holland in this court said that we were free, as Harman J. was not, or at any rate that we were less restricted than was he, in regard to the three cases in point, and that it was open to us to say that, in the light of later decisions, they should be treated now as wrongly decided. On the other hand, they have all of them stood for some time. In *In re Compton* (4) Lord Greene M.R., after referring to the poor-relations cases, said: "If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently on the ground that their purpose was a private family purpose, lacking the necessary public character, but it is in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations on the faith that they were charitable, and many testators have, no doubt, been guided by these decisions. The cases must at this date be regarded as good law, although they are, perhaps, anomalous." Without going further into the matter (because, as will presently appear, I think it unnecessary), it would, I think, be impossible for the court in the light of that observation to treat now as wrongly decided the poor-relations cases, properly so called. And it is true that Lord Greene M.R. earlier in his judgment had said that the explanation of them might be—not was, but might be—that relief of poverty in itself supplied the necessary public characteristic.

(1) [1896] 2 Ch. 727.

(3) [1949] Ch. 572, 579.

(2) [1914] 2 Ch. 90.

(4) [1945] Ch. 123, 139.

Those other cases, *Spiller v. Maude* (1), *In re Gosling* (2), and *In re Buck* (3) have also stood for some time; so that again it might be said that the anomaly ought now to be treated as extending in any case to them also, because many persons would have regulated their affairs in accordance with the guidance which those decisions give, and that a parity of reasoning should apply to them as to the poor-relations cases founded on *Isaac v. de Froez* (4).

I have mentioned these matters because they are of great importance, and because, as it seems to me, they present a somewhat nicely balanced problem for consideration. If in this or some other case the question of the charitable qualification of trusts in favour of employees of companies or businesses (which under modern conditions might include such classes as the whole of the coalminers, or the whole of the railway servants of England) arose, the House of Lords might well consider some new formulation of the proper principle applicable. But, so far as this court is concerned, it seems to me that the matter has already been concluded.

It has before been observed to be a peculiar and unfortunate characteristic of our system that, although in the great majority of cases which come before it, this court is the final court of appeal for England, no provision whatever is made for taking a note or making a record of the judgments of the court. It appears that in 1935, on January 11, there came before this court, which we are told consisted of Lord Hanworth M.R., Romer and Slessor L.JJ., the case of *In re Sir Robert Laidlaw* (5). Mr. Buckley has been good enough to supply the court with such material as the vagaries of our recording system have left for posterity. It includes, fortunately, an extract from the relevant part of the will of Sir Robert Laidlaw. The terms of the will were these: "The sum of 2,000*l.* to the trustees for the time being "of the provident fund which has been established in connexion with the business of Whiteaway, Laidlaw & Co. Ltd., "which company was constituted to take over and took over "the business of my former firm"—which he names—"upon "trust to invest the same in any investments in which they "can invest money forming part of such provident fund and "to apply the income of the said sum and the investments

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(1) 32 Ch. D. 158.

(4) (1754) 2 Amb. 595.

(2) 48 W. R. 300.

(5) 1935, Unreported.

(3) [1896] 2 Ch 727.

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“ for the time being representing the same in their uncontrolled
“ discretion for the relief of poor members or former members
“ of the staff of the said company or their families.”

I think that for practical purposes it is clear, and Mr. Milner Holland has conceded, that the point raised in the present case was inevitably and directly involved also in the *Laidlaw* case ; for on the face of it in that case an express trust had been established in perpetuity to provide for poor employees of a particular business concern. In the court of first instance, the decision had apparently been given, in favour of the testator's next of kin or residuary legatees, that the trusts which I have read did not constitute a valid charitable trust. An appeal was brought to this court after the Attorney-General had been added as a party. Again we are indebted to Mr. Buckley, who has seen the instructions which were laid before Mr. Andrewes Uthwatt as counsel for the Attorney-General. Those instructions make it clear that the attention of the Attorney-General was specifically drawn to the cases on the one hand of *In re Gosling* (1) and on the other of *In re Drummond* (2). So that at least the point was put quite manifestly to the Attorney-General. In this court, however, the Attorney-General does not appear to have been called upon to argue. As I have already stated, no note exists of the terms of the judgment, but the appeal was allowed and the order was, so far as relevant, that the legacy was “ a valid charitable legacy “ for the benefit of the persons who shall from time to time “ and for the time being be poor members or poor former “ members of the staff ” of this company.

Faced with that decision, Mr. Milner Holland was obviously in a very considerable difficulty. Reference was made to the recent decision of the full Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.* (3) which has laid down that this court is bound by the decisions of the Court of Appeal save in certain precise and fairly well defined exceptions. Only one exception could be invoked by Mr. Milner Holland, and that was that in *In re Laidlaw* the decision must be taken to have been given per incuriam. In the first place, I think myself that it would be for Mr. Milner Holland to show that (if it was so) the decision was given per incuriam ; in other words, the onus would be upon him. Prima facie one must, I think, assume that in a case in which the point is directly

(1) 48 W. R. 300.

(3) [1944] K. B. 718.

(2) [1914] 2 Ch. 90.

raised, the judges of this court will have considered it, more particularly where they reverse the decision of the court below, which had decided against the validity of the charity. Following loyally, therefore, *Young v. Bristol Aeroplane Co. Ltd.* (1), I conclude that we are here bound, and that this particular trust which I have already many times mentioned must be treated as a valid charitable trust.

The result upon this part of the case is therefore again that I think that Harman J. was correct. I have thought it right to deal somewhat fully with the matter, because the particular ground on which I rely, and must rely for my conclusion, was not put to the judge. *In re Sir Robert Laidlaw* had not then emerged from the fifteen years of obscurity in which it appears to have remained until today. It does not appear on what precise ground the case was determined, and I therefore feel it right, in case the matter is hereafter considered in a higher court, to say that I must not be taken to accept the view that the ground for justifying such decisions as the poor-relations cases is, as Harman J. expressed it—I have read the passage (2)—“The explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories.” I think, as Lord Greene M.R. stated in *In re Compton* (3), that that may be an explanation. On the other hand, it may be that they simply must be regarded now as a well-established anomaly. I find it unnecessary in the circumstances to say any more or to express a view one way or another whether the principle to which Harman J. referred should be treated as well established, or whether the three cases, *Spiller v. Maude* (4), *In re Gosling* (5) and *In re Buck* (6) ought now to be regarded as rightly decided. I think that, so far as I am concerned, this question has been determined by *In re Sir Robert Laidlaw*, on grounds which are not apparent, and I loyally follow them without affirming or disaffirming any of the grounds relied on by Harman J.

That, *prima facie*, would of course be the end of the case ; but earlier in the argument, when Mr. Blanshard Stamp addressed the court on the matter of construction, he indicated another argument which those whom he represents desire to put before the court ; namely, that assuming that there was here a

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(1) [1944] K. B. 718.

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(3) [1945] Ch. 123.

(6) [1896] 2 Ch. 727.

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valid charitable trust, nevertheless there was no general charitable intention. That point was not argued before Harman J. at all, so far as I understand it. The judge, having decided the two main points, (1.) that of the construction of the deed, and (2.) the point of law which I have discussed, then proceeded without any discouragement from any of the counsel present to direct that on the evidence it would be necessary for a scheme to be prepared for the *cy-près* administration of the fund. That was, on the hypothesis that there is here a general charitable intention, undoubtedly necessary. The prosperity of the company since 1918, and I suppose of its employees, has been such that the fund now subject of the deed amounts to over 100,000*l.*; and it is proved quite clearly that there are not at the moment available necessitous servants or ex-servants or members of their families in sufficient numbers to absorb anything like the whole income of the fund. It must also be assumed that in the foreseeable future that state of affairs will continue. On that basis, what should now be done? The answer to that question depends on whether there is or is not here a general charitable intention. The question whether in any case there is to be found a general charitable intention is, as has been said more than once, a question for which it is not easy to formulate precisely the principles of the answer. In Tudor on Charities (5th ed.), p. 145, I find it stated that the notion of general intention of charity is hardly susceptible of accurate definition, and two quotations are then given by way of illustration. The first is from Kay J. in *In re Taylor* (1): "If upon the whole scope and intent "of the will you discern the paramount object of the testator "was not to benefit a particular institution, but to effect "a particular form of charity independently of any special "intention or mode, then . . . if the particular mode "for any reason fails, the court, if it sees a sufficient expression "of a general intention of charity, will, to use the phrase "familiar to us, execute that *cy-près*." The second quotation is from a Scottish case before Lord Johnston in the Court of Session, *Burgess's Trustees v. Crawford* (2): "If this bequest "is to be carried out *cy-près* . . . it is necessary that we "should be able to find that the testator had evinced expressly "or by implication an intention to dedicate his money to "charity, independently of the particular modus in which "he has directed it to be applied. But . . . with this

(1) (1888) 58 L. T. 538, 543. . . (2) 1912 S. C. 387, 396.

“qualification, that by charity I mean . . . not charitable purposes generally, but some charitable purpose in the concrete, definitely, however generally, defined.”

Those two passages taken alone seem to indicate that there is, so to speak, an onus, and not a slight onus, upon those who allege a general charitable intention, to show it. But I think that the statements which I have cited should perhaps be further qualified.

Mr. Buckley referred to an earlier page in *Tudor on Charities* (5th ed.), p. 141, whence he cited this passage: “There is an ‘exception to this rule’—the rule that the *cy-près* principle is confined to property given with the general intention—‘concerning property given absolutely and perpetually to charity, and which has vested in the charity: in such circumstances, a rule of convenience has grown up that on the subsequent failure of the trusts, the fund can be applied *cy-près* irrespective of the donor’s intention.’” Mr. Buckley himself formulated his proposition in these terms: if property has been effectively devoted to a charitable purpose with the contemplation that it will continue indefinitely and without any contemplation of reverter, then, once that effective devotion has occurred, there is sufficient element of general charitable intention. In other words, as he also put it, where it can be seen on the face of the document that the donor has divested himself in favour of the particular charitable object without reserving or contemplating any executory right of reverter, then, whether as a rule of convenience or otherwise, a general charitable intention should be inferred.

I will assume in Mr. Buckley’s favour that he has, as he commonly does, formulated correctly the proposition to be applied. Nevertheless, when I examine again this deed in the light of properly admissible surrounding circumstances, I conclude that there is here no general charitable intention. In the first place, I observe that the source of the fund is a percentage of the profits of the trade of the company accumulated over a number of years, and, second that the objects of the trust are the servants and ex-servants of that company (or of associated companies) and their families. Thus, there is, to start with, what I have already described as something which is, on the face of it, of a domestic character. Certainly, as my brother Wynn-Parry pointed out, the last beneficiaries that one would expect the company ever to have contemplated would be employees of similar companies,

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competitors in trade of this company. But it may well be that it would be wrong to over-emphasize that, because as Mr. Buckley points out, when the *cy-près* doctrine has to be applied, the result may well surprise and even disappoint the original donor.

However, the matter does not end there. As I have said, the objects of the fund are confined to servants of this company and associated companies and families of those servants. Then, by cl. 12, provision is made for what is to happen if the company ceases as a trading concern to exist altogether, i.e. is wound up. That, of course, it might be said, would raise very clearly the question: was there a general charitable intention? And, in so far as cl. 12 answers the question, it answers it by saying that in that event the whole fund is to be distributed amongst the members of the class then in existence, or such of them as a committee therein specified select. It is therefore clearly contemplated at the least that, if the trading concern ceases to exist, then there is to be a final winding up of this charitable trust; or to put it in another way, it emphasizes the domestic character of the trust by saying that it is limited not only to the servants of the company, etc., but to the business life of the company.

Finally there is cl. 15. That provides that "the company may at any time or times with the sanction of a special resolution of the company in general meeting rescind alter or modify the provisions of these presents or any of them." On an authority to which I will refer in a moment, it is clear, I think, that the court is entitled, in construing this deed, and in arriving at a conclusion whether there is a general intention in favour of charity, to take account of that clause, even though it may be invalid as being an infringement of the rule against perpetuities. If the proper construction of that clause (which, as I have indicated, relates to "provisions of these presents or any of them") is to read into each clause a proviso to the effect that the company may at any time rescind or alter it, I venture to think that the case becomes at any rate very near to the type of case where there is a particular trust established (limited as I have indicated) with an express provision that, if the donor or some other person comes to the conclusion that the trust is no longer workable or desirable, then he may revoke it. Mr. Buckley, I agree, distinguishes the two. He says that a power to revoke, without any indication of the grounds upon which the company would act, differs

from the other type of case where there is a power to put an end to the trusts if the originally expressed intention ceases to be capable of being exactly carried out.

In any case, what we are here concerned with is a matter not expressly mentioned at all. We are concerned not with what is to happen when the trusts fail to be effective through bad management or undesirability, but when they have failed through lack of sufficient objects of benefaction. Nevertheless, taking this clause together with the earlier cl. 12, and in the light of the other circumstances, and finding—as I can find—no express indication of intended perpetuity, I feel myself compelled to conclude that there was never here a general charitable intention, but only an intention to make this particular provision for this company's (and its associated companies') own employees and their families.

I cannot, I think, leave the matter without one brief reference to the authorities. Mr. Blanshard Stamp in the earlier argument to which I alluded, drew our attention to *Clark v. Taylor* (1). There a testator had made a benefaction in favour of a particular school, a school associated with the name of a Mrs. Enderby, for orphan girls. It appeared that Mrs. Enderby discontinued the school within a month after the testator's death. As a matter of construction, Sir Robert Kindersley V.-C., came to the conclusion that there was no general charitable intention. That is illustration one. But there have been other and later cases, which may not be altogether easy to relate together; cases, for the most part, in which use was sought to be made of rights of reverter, express rights, which were found to be invalid as infringing the rule against perpetuities. One of them, and it is a case upon which naturally enough, Mr. Buckley relied, was *In re Peel's Release* (2), which, I think, related to the same charity as that which was the subject of the earlier case concerning Sir Robert Peel's School at Tamworth to which I referred in my first judgment. There there is found on the one hand an express provision that the property granted in the year 1837 should be "forever thereafter" applied to the charitable use indicated; but there is found also a right, which Sir Robert Peel in 1921 sought to exercise, of putting an end to the trust if, in his view, the management was unsatisfactory, and so on.

That case, together with three others, one somewhat parallel

(1) (1853) 1 Drew. 642.

(2) [1921] 2 Ch. 218.

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and two others different in certain vital respects, was considered by Maugham J. in *In re Talbot* (1). There the main problem arose by reason of the effect of s. 18 of the Methodist Church Union Act, 1929, upon certain trusts which an earlier testator had established. The form of the trust there had not contained any express indication of perpetuity such as words "forever thereafter," which are found in *Peel's Release* (2). There was a provision that, in case the chapel connected with the trusts should in the opinion of the trustees cease to be used for preaching the particular doctrine which the testator was obviously concerned to advance, there was to be a right to put an end to them. That clause was held to be void because of the perpetuity rule. But the judge considered these various cases, and, as I follow his judgment, he came to the conclusion that they were reconcilable upon this principle: he said first of all (3)—and this is a point which I earlier anticipated: "In considering "whether there is or is not a general charitable intent, a thing "which is not capable of exact definition, the court, I think, "has to consider the whole scope and effect of the will and may "rely on a proviso of the nature of a defeasance clause, whether "or not such a clause is open to objection on the ground of "perpetuity." Applying that principle, Maugham J. reconciled the cases somewhat as follows: in *In re Peel's Release* (2) and in *In re Bowen* (4) there was express language indicating perpetuity. (I have already mentioned in the case of *Peel's Release* (2) the use of the words "forever thereafter.") In each of the other cases which appeared to produce a different result, *In re Blunt's Trusts* (5) and *In re Randell* (6), there was, on the face of the document concerned, apparently an intention that the provision should only exist for a limited period, namely, so long as certain conditions subsisted. In the particular case of *In re Talbot* (1) the judge would have come to the conclusion that it fell in the latter class; but in fact he held that the original trusts must be taken to have been altered by s. 18 of the Act of 1929 and therefore given a valid element of perpetuity, or at least a new lease of life, which produced the result that they could not be treated as having come to an end.

(1) [1933] Ch. 895.

(2) [1921] 2 Ch. 218.

(3) [1933] Ch. 902.

(4) [1893] 2 Ch. 491.

(5) [1904] 2 Ch. 767.

(6) (1888) 38 Ch. D. 213.

Applying the reasoning of *In re Talbot* (1) to the present case, it seems to me that, for reasons already indicated, there is here a trust which seems on the face of it to be intended for a domestic purpose, and for a limited period, namely, the period during which these conditions essential for its being carried into effect should persist. One condition would obviously be the continuance of the company, but another is the continuance of a sufficient number of persons belonging to the class of beneficiaries defined. I therefore think that there is here no sufficient ground for saying that a general charitable intention has been shown.

The result is that, in so far as the funds are not now required, or may not be required, for carrying out the trusts imposed by the deed, they do not fall to be applied *cy-près* to other charitable objects, but revert to the company. That result is, of course, unaffected by the circumstance that the express power of revocation, which I gather has been in fact exercised, is, or may be, invalid according to the rule against perpetuities. In the circumstances, it is not necessary to decide whether that express power is valid or invalid, because I understand the company does not seek to withdraw from the trust, and has not by its deed of revocation sought to withdraw from the trust, funds which are required for carrying out the original express trust. The result is therefore the same, whether the deed of revocation operates or whether it comes back to the company by way of resulting trust by operation of law and not by virtue of the execution of the deed. For the reasons which I have indicated, I conclude that there is here no general charitable intention, so that, subject to the due execution of the specific trusts of *cll.* 3 and 4, the property would revert to the company.

ASQUITH L.J. : I agree entirely with the judgment of the Master of the Rolls, which appears to me to cover the whole ground, and I have nothing to add.

WYNN-PARRY L.J. : I also agree with all that has fallen from the Master of the Rolls. It is true that we are differing from the order made by Harman J. as regards the direction that the fund should be administered *cy-près*, and, but for the circumstance that this point was not argued before the judge, I should have felt bound to add a few words. Seeing, however,

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that the ground has been so fully covered by the Master of the Rolls, and that the point was not argued before the judge, I shall not be thought discourteous if I add nothing for myself.

Appeal allowed.

Solicitors for all parties other than the Attorney-General:
Slaughter and May.

Solicitor for the Attorney-General: *Treasury Solicitor.*

B. A. B.

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WILLIAMS *v.* HOPKINS AND OTHERS.

[1948 R. 2206.]

Will—Construction—Bequest “to my trustees they well knowing my wishes concerning the same”—Testator’s orally expressed intention that trustees should take beneficially.

A testator died on September 9, 1944, having by his will appointed a certain friend and his solicitor (thereinafter called his “trustees”) to be executors and trustees thereof. He devised and bequeathed the whole of his property “(subject to “payment of my funeral and testamentary expenses and debts) unto my trustees absolutely they well knowing my wishes “concerning the same” The testator told his trustees when he made his will that he wished them to make certain payments out of his estate and to retain any surplus for their own use. After the payments directed by the testator had been made, a substantial sum remained in the hands of the surviving trustee. Vaisey J. held that the part of the estate not required to give effect to the testator’s wishes was undisposed of by his will and passed as on an intestacy.

Held, dismissing the solicitor’s appeal, that on the true construction of the will the gift was a fiduciary one to the trustees and not a gift to them upon a condition; that evidence was not admissible to show that the trustees took not a trust estate but a conditional gift; and that accordingly, subject to the specific purposes indicated by the testator, the estate was undisposed of by the will and passed as on intestacy.

Irvine v. Sullivan (1869) L. R. 8 Eq. 673; *Croome v. Croome* (1888) 59 L. T. 582; and *In re Foord* [1922] 2 Ch. 519, considered. Decision of Vaisey J. [1949] Ch. 541, affirmed.

APPEAL from Vaisey J. (1).

The testator, the Reverend Thomas Richard Rees, made his will on July 20, 1936. He appointed his friend, Thomas Hopkins, and his solicitor, the plaintiff, Roger Williams (thereinafter called his trustees) to be executors and trustees thereof. By cl. 3 he devised and bequeathed the whole of his property " (subject to payment of my funeral and testamentary " expenses and debts) unto my trustees absolutely they well " knowing my wishes concerning the same and I direct them to " permit my brother . . . to have and receive the rents and " profits of my property Vardre Clydach . . . during his " lifetime." The will also included a charging clause authorizing Roger Williams or any professional person who might become an executor or trustee thereof to charge for professional services.

The testator survived his brother and died on September 9, 1944. Probate of the will was granted to Thomas Hopkins and the plaintiff on March 2, 1945. The testator's residuary estate amounted approximately to 30,000*l*. Thomas Hopkins died on September 12, 1945. The plaintiff stated in evidence that the testator was a bachelor and that his only near relative was his brother, whose welfare was the testator's chief concern. The testator had frequently discussed the disposition of his property with the plaintiff and had said that he wished a certain housekeeper to be rewarded for her services and that he wished to make a number of gifts, including certain charitable gifts. The testator had a number of collateral relations with whom he had little contact, and at some time he had informed the plaintiff that the only relative he wished to benefit was his brother. The testator had, after some discussion, finally decided to leave his estate to the plaintiff and Thomas Hopkins on their assurance that they would give effect to the wishes which he had previously communicated to them, and on the understanding that any surplus was to be retained by them for their own use. The plaintiff had felt somewhat uneasy as to the form of the will and had urged the testator to make another will in more explicit terms; but the testator made no other will.

The question raised by the summons was whether the estate of the testator, so far as not required for the payment of his debts and funeral and testamentary expenses vested on his death in Thomas Hopkins and the plaintiff absolutely and

(1) [1949] Ch. 541.

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beneficially, subject to an obligation to give effect to his wishes communicated to them in his lifetime, or on a resulting trust for the persons entitled as on intestacy.

Vaisey J. held that the balance of the estate was undisposed of and passed to the testator's statutory next of kin as on intestacy.

The plaintiff appealed.

Milner Holland K.C. and *Bowles* for the plaintiff. It is first contended that the construction put on the will by the judge was wrong. The gift in the first instance is to the trustees "absolutely." By the use of this word the testator has shown that he means absolutely and beneficially. The word "absolutely" was unnecessary and would not have been used by the testator had he intended the donees to take in a fiduciary capacity. The will manifestly does not dispose of the whole of the testator's property. The use of the word "permit" shows that the testator intended the plaintiff and his co-trustee, Thomas Hopkins, to hold the property upon trust for themselves subject to their allowing the testator's brother to enjoy the rents and profits of Vardre Clydach during his life. If the court is against the plaintiff on the point of construction, it is submitted that it is impossible to admit evidence as to some only of the testator's wishes and not as to all of them. It follows that evidence as to what he wanted done with the balance of the fund is admissible. [Counsel referred to *Croome v. Croome* (1) ; *In re Huxtable* (2).]

Ungoed Thomas K.C. and *Rowe Harding* for the defendants, the testator's next of kin, were not called on.

EVERSHED M.R. The question has arisen whether under the terms of the will, and having regard to properly admissible evidence, the plaintiff in the action, the surviving executor and trustee, Mr. Roger Williams, can either alone or with the personal representatives of Mr. Hopkins claim beneficially the residue of the testator's property which has turned out to be considerable. His claim so to do rests on this, that the expression of the testator's wishes concerning the estate mentioned in the third clause of his will has been proved to consist of communications made both to the plaintiff and

(1) (1888) 59 L. T. 582.
(Affd. in H.L. 61 L.T. 814.)

(2) [1902] 1 Ch. 214; [1902]
2 Ch. 79.

Mr. Hopkins providing for payments to be made to a number of persons. Those payments do not anything like exhaust the residue. But in addition the plaintiff says that the testator informed him (though it does not in fact appear that this information was given also to Mr. Hopkins) that the residue left after discharging these various payments was to belong beneficially to the two of them, Mr. Hopkins and the plaintiff.

Vaisey J. answered negatively the question which I have posed, and I agree with him. There are two distinct points. The first is one of the construction of the will. On its true interpretation, does cl. 3 confer on the persons named as trustees an interest in the property on trust only, or does it give the property to those two persons conditionally on their discharging the wishes communicated to them? The second point which arises, if the first is decided adversely to the plaintiff, is this: although the form of the will on its proper reading, creates only a trust estate in the trustees, can they, nevertheless, by oral evidence, prove that they held it on trust, having discharged the several payments to which I have already alluded, for the two trustees beneficially or the survivor of them? I will deal with the two questions in that order, the order in which Mr. Milner Holland and Mr. Bowles argued them.

On the question of construction, the judge cited three cases, *Irvine v. Sullivan* (1), *Croome v. Croome* (2), a case in this court, and *In re Foord* (3). All those cases were, as Vaisey J. observed, very different from the present on their facts, but they indicate the principle properly applicable in cases of this kind. I need not, in the circumstances, refer to all of them. It is sufficient, I think, to make two references to the judgment of Sargant J. in *In re Foord* (3). That case, I will observe in passing, concerned a will which was of a very untechnical character: it was pre-eminently what is sometimes called in these courts a home-made will. But it is of special significance in the present case, because in that will the testator used the word, in reference to the vital bequest, "absolutely." In approaching the problem Sargant J. cited a passage from the judgment of Lord Eldon L.C. in *King v. Denison* (4) (which was also cited in the Court of Appeal in *Croome v. Croome* (2)) and I will adopt as part of this

(1) (1869) L. R. 8 Eq. 673.

(2) 59 L. T. 582.

(3) [1922] 2 Ch. 519, 521.

(4) (1813) 1 Ves. & B. 260, 272.

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C. A. judgment a part of that quotation : “ ‘ If I give to A.’ ”
 —said Lord Eldon L.C.—“ ‘ and his heirs all my real estate,
 1949 “ ‘ charged with my debts, that is a devise to him for a particular
 REES, “ ‘ purpose, but not for that purpose only. If the devise
 In re. “ ‘ is upon trust to pay my debts, that is a devise for a
 WILLIAMS “ ‘ particular purpose, and nothing more ; and the effect of
 v. “ ‘ those two modes admits just this difference. The former
 HOPKINS. “ ‘ is a devise of an estate of inheritance for the purpose of giving
 Evershed M.R. “ ‘ the devisee the beneficial interest, subject to a particular
 “ ‘ purpose : the latter is a devise for a particular purpose ;
 “ ‘ with no intention to give him any beneficial interest.’ ”

That is the formulation of the problem, and the question in this case, as it was in *In re Foord* (1) is : which of the two alternatives applies ? It is right to say that, as Sargant J. observed, the cases show that slight indications may well suffice to persuade the court that the intention of the testator was not to create a trust estate in the devisee but to give him a conditional gift. As I have referred to the case, and as I have mentioned the use of the word “ absolutely,” I will cite one other passage from Sargant J.’s judgment. Referring to the argument, he said (2) : “ First, there is the use of ‘ the word ‘ absolutely.’ No doubt it might, especially if “ used by some one acquainted with legal language, be “ construed as describing the extent of the interest in the “ property given—namely, the fee simple in freehold property “ and the absolute interest in personal property. But I think “ in this extremely untechnical will the testator must have used “ it to mean ‘ out and out,’ and that it therefore carried not “ merely the full legal interest but the beneficial interest “ also.”

I approach the construction of this document in the light of that statement of principle by Lord Eldon L.C. which Sargant J. applied in *In re Foord* (1). The first thing I note about this will is that, far from being an untechnical document, it is quite manifestly a lawyer’s document. The whole language of it shows, and it is, of course, plainly the fact, that it was prepared professionally by a lawyer; and the language from first to last is the technical language of the lawyer. Then we come, secondly, to the use in that context of the word “ absolutely ” in reference to which I have made the citation from Sargant J. I think that in this context, and in this will, the word “ absolutely ” should be construed not

(1) [1922] 2 Ch. 519.

(2) Ibid. 522.

as conferring a beneficial interest but as defining the extent of the interest in the property given, so as to confer upon the trustees the property given to them—and I borrow the language used by Cohen L.J. during the argument—free of any fetter which would prevent their carrying out his express wishes. If that be the right conclusion, it goes far towards answering the question raised, for Mr. Milner Holland candidly admitted that the construction which he sought to place on the word “absolutely” was the linchpin of his argument, and that without it his case would wear a somewhat pale complexion.

But the matter does not end there, because the next phrase is, after referring to his wishes, “and [I] direct them to permit my brother to have and receive the rents” Mr. Milner Holland said that the use of the word “permit” indicated something less than the obligation of a trust; but the phrase is not merely “to permit” but “I direct them to permit.” I think that that is pre-eminently language which is apt to impose the obligation of trusteeship.

During the argument the point emerged that the brother, Lewis John Rees, to whom the benefit of the property was given, would, had he survived, in fact have been the sole statutory next of kin of the testator. It was suggested that that was a relevant circumstance, because if there was here a trust which was a trust in favour of the next of kin, so far as it was not exhausted by the express wishes, then the surprising conclusion would be reached that the person to benefit would be the same person to whom a limited interest had been given in part of the property. That seemed to me at first sight a not inconsiderable argument, and it was one which I gather was not put to the judge in the court below. But I have come to the conclusion that on the whole it is insufficient to tip the balance away from the trust and in favour of the conditional gift. I think that it should not in this case be assumed that the testator appreciated that if Lewis John Rees survived him, as in fact he did not, he would be the person who under the statute would take beneficially the whole of his estate.

In any case, if so far the balance be a nice one between the two alternatives, we then have to consider the effect of cl. 4, the charging clause, which is the longest clause in the will. I do not want to over-emphasize the significance of it. I have already said that this is pre-eminently a lawyer’s will; and none but a lawyer, certainly, would

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have inserted a clause in this language. But it goes somewhat further than that, for on Mr. Milner Holland's construction the only possible effect that this substantial clause, occupying, as I say, about a third of the whole document, could have, would be to enable the plaintiff, the solicitor, to throw upon his co-trustee and supposed co-beneficiary, Tom Hopkins, one half of the costs which the plaintiff's firm would charge for carrying out the duties imposed on them—a result which I conceive would be the last thing that the plaintiff could have intended when he drew the will, or the testator when he executed it. I therefore come to the conclusion, agreeing with the judge on the first point, that this will, properly interpreted, confers on the two trustees an estate on trust and not a conditional gift.

That makes it necessary to consider the second question. As I have already indicated, I agree with the judge that to admit evidence to the effect that the testator informed one of the executors—or, I will assume in Mr. Milner Holland's favour, both of the executors—that he intended them to take beneficial interests and that his wishes included that intention, would be to conflict with the terms of the will as I have construed them; for the inevitable result of admitting that evidence and giving effect to it would be that the will would be regarded not as conferring a trust estate only upon the two trustees, but as giving them a conditional gift which on construction is the thing which, if I am right, it does not do. Mr. Milner Holland's answer is that, once the "wishes concerning the same," so far as they relate to third parties, are admitted, then there is no inconsistency, since this, after all, is part of the wishes. According to the evidence, I think that not entirely clear, but I assume it in Mr. Milner Holland's favour. Still, as I think, that does not get over the difficulty. The admission of this evidence would involve that the trustees took not a trust estate, but a conditional gift. The point was thus put by my brother Cohen during the argument: suppose that the express wishes were contained in some document, and that the document stated that, subject to satisfaction of these various gifts, the residue should belong to the two named persons absolutely: what would be the situation then? My first answer would be that that does not happen to be the fact in this case; but if it were so and such a document were referred to in the will, then it seems to me that *prima facie* that document would have to be

included in the probate, and the question then would have been one of the construction of the two documents, the will and the memorandum together. That I take from the statement in *Theobald on Wills* (10th ed.), p. 66.

I therefore agree with the judge also upon this point, and I venture to cite from his judgment one short passage which seems to me to put the point concisely and forcibly. Having said what the nature of the evidence was, he continued (1): "Nor do I think that they"—that is Mr. Hopkins and the plaintiff—"having satisfied the primary purposes 'indicated to them by the testator'—that is the other gifts to third parties—'can turn round and say: 'We are no longer 'trustees; we take beneficially,' any more than they can 'say: 'We are trustees for ourselves'.'" The judge in the next sentence expressed some regret at having come to a conclusion which probably defeated the wishes of the testator. I, also, am not insensible to that. At the same time my own regrets are moderated to this extent: 'in the general public interest it is not to be forgotten that Parliament has laid it down that *prima facie* a will disposing of the property of a deceased person must follow certain strict forms. These courts have also been very insistent on the importance of the principle that those who assume the office of trustees should not, so far as they fairly can prevent it, allow themselves to be in a position in which their interests and their duties conflict.' This is a case in which the will, as I have said, was drawn by a solicitor, or by a member of a solicitor's firm, and the claim is that that solicitor is entitled, either absolutely or jointly with another, to the whole beneficial interest. In the general public interest it seems to me desirable that if a testator wishes his property to go to his solicitor and the solicitor prepares the will, that intention on the part of the testator should appear plainly on the will and should not be arrived at by the more oblique method of what is sometimes called a secret trust. Having said that much, however, it is only right that I should make it quite plain that in this case I am making no kind of reflection upon the good faith and propriety of the solicitor, who is the plaintiff in this case. The judge expressed the view that there was here no sort of case for suggesting any impropriety on the part of the solicitor, and I do not want to be thought, having said what I have said, to be casting any doubt on the justice of those

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Evershed M.R.

C. A. observations. For the reasons which I have given, I think
 1949 that the claim here fails, and that the appeal should be
 REES, dismissed.
In re.
 WILLIAMS COHEN L.J. I agree so entirely with what has fallen from
 v. my Lord, that I do not desire to add any reasons of my own
 HOPKINS, for agreeing in his conclusion.

ASQUITH L.J. I also agree.

Appeal dismissed.

Solicitors : *Chamberlain & Co. for Beor, Wilson and Lloyd,
 Swansea : D. Miles Griffiths & Co. for J. O. Morgan, Pontardawe.*

B. A. B.

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 v. LLOYDS BANK LD.

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[1949 M. 2378.]

Nov. 2, 4,
 8, 9.

*Trust—Construction of trust deed—Nationalization of certain undertakings
 —Government stock issued in substitution for ordinary shares in
 undertakings—Sale of Government stock—Application for power to
 sell—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 57—Transport Act,
 1947 (10 & 11 Geo. 6, c. 49), s. 16, sch. V, pt. I, para. 5—Electricity
 Act, 1947 (10 & 11 Geo. 6, c. 54), s. 20, sch. III, pt. I, para. 5—
 Gas Act, 1948 (11 & 12 Geo. 6, c. 67), s. 25, sch. II, pt. I, para. 5,
 pt. II, para. 2.*

By a deed of trust dated December 6, 1932, and made between the plaintiffs of the one part and the defendant bank (trustee) of the other part it was provided that the trustee should hold the "deposited property upon trust for the holders according to the provisions of this deed." The deposited property included ordinary stocks and shares in certain transport, electricity and gas undertakings. The trust deed provided (*inter alia*): Cl. 1: "'Ordinary share' means any share or stock of any company which entitles the holder to participate without limit in the earnings and assets of the company . . . 'Security' means any bond debenture debenture stock . . . and any share or stock or other interest in the profits or assets of a company other than an ordinary share . . . " "'Share unit' means the ordinary shares specified in the first schedule to this deed with only such changes therein as are provided for in this deed."

"The managers" and "the trustee" were respectively defined as the plaintiffs or their successors and the first defendants or their successors. Cl. 23: "If the managers shall certify in writing to the trustee that in the opinion of the Managers . . . (E) Any fundamental change has been made in the rights attaching to any ordinary shares of any company: and shall at the same time require the trustee to sell the ordinary shares of such company . . . the trustee shall sell those shares" Cl. 27: "The trustee shall as soon as practicable sell and convert into cash all ordinary shares and securities received by it in respect of any unit (other than ordinary shares forming the share unit and fully paid bonus ordinary shares which the trustee is expressly required to retain . . .) and if there shall be deposited with the trustee by the managers as part of any unit any property which the trustee would have been required to sell if the same had been received in respect of any existing unit the same shall also be forthwith sold and converted into cash." Cls. 28 and 29 prescribed the manner in which the trustee should conduct any sale under the trust deed. On the nationalization of transport, gas and electricity the trustee received British Transport Stock and British Electricity Stock, and would in due course become entitled to receive British Gas Stock, in substitution for the ordinary shares above referred to.

The questions asked by the summons (so far as relevant) were: (1.) Whether the stock issued in lieu of ordinary shares on the nationalization of transport, electricity and gas undertakings ought to be sold by the trustee in accordance with cls. 27, 28 and 29 of the trust deed. (2.) If the answer to question (1.) were in the negative in regard to all or any of the stock, whether the managers were now in a position to give a certificate in writing under cl. 23. (3.) The summons further asked that under s. 57, sub-s. 1, of the Trustee Act, 1925, power to sell the said stock, exercisable at the request of the plaintiffs, might be conferred on the defendant bank.

It was conceded that 770*l.* British Transport 3 per cent. guaranteed stock issued to a certain private transport undertaking, under the Transport Act, 1947, and distributed by them by way of a special capital profits dividend stood on a different footing from the other government stocks and would have to be sold. Question (1.) of the summons was determined for convenience by reference to the Electricity Act, 1947.

Held, (1.) that, by virtue of para. 5 of part I of sch. III to the Electricity Act, 1947, the holders of the British Electricity Stock were to be in the same position as regards that stock as they had been hitherto as regards the ordinary shares in substitution for which that stock was issued; that any provisions of the trust deed which were inconsistent with the retention of the stock were, by reason of the second part of para. 5, to be regarded as modified so far as was necessary to attain the object of the paragraph; and that, accordingly, the Electricity Stock ought not to be sold, and, similarly the Transport Stock and the Gas Stock (when

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issued) ought not to be sold ; but that the 770*l.* British Transport 3 per cent. Stock, however, must be sold. (2.) That the position of the ordinary stock, in respect of which British Gas Stock would be issued, was until that issue governed by para. 2 of part II of sch. II to the Gas Act, 1948 ; that at the present time therefore there was a fundamental change in the rights attaching to the aforesaid ordinary stock ; that the managers were accordingly in a position to give a certificate in writing under cl. 23 of the trust deed ; but that they were precluded by the finding under question (1.) from giving such a certificate in respect of the British Transport Stock or the British Electricity Stock or the British Gas Stock when it was issued. (3.) That the scope of s. 57 was limited by the words " where in the management or administration of any " property " and no difficulty arose in the administration or management from the continued holding of the government stocks in the unit ; that, moreover, the trust deed contained a power to sell although it was not that sought by the summons ; that accordingly the court had not jurisdiction under s. 57 of the Trustee Act, 1925, to empower the trustee to sell the stocks ; and that, even if it had had that jurisdiction, this was not a case in which it would have been expedient to exercise it by conferring on the trustee power to sell.

In re Pratt's Will Trusts [1943] Ch. 326, followed.

ADJOURNED SUMMONS.

By a deed of trust dated December 6, 1932, made between the plaintiffs, Municipal and General Securities Co. Ltd., of the one part and Lloyds Bank Ltd. (trustee) of the other part and known as the " Second British Fixed Trust," it was provided that the trustee should hold the " deposited property " upon trust for the holders according to the provisions of " this deed." It was the object of the trust that the portfolio held by the trustee should consist exclusively of ordinary shares. The trust property included ordinary stocks and shares in certain transport, electricity and gas undertakings.

The trust deed provided (inter alia) :—

Cl. 1: " ' Ordinary share ' means any share or stock " of any company which entitles the holder to participate " without limit in the earnings and assets of the company " and is not redeemable or repayable at the will of the " company." " ' Security ' means any bond debenture debenture stock obligation or certificate of indebtedness and " any share or stock or other interest in the profits or assets " of a company other than an Ordinary Share and includes " rights as hereinafter defined." " ' Company ' means any " corporation (whether incorporated under the Companies' " Acts or not) incorporated in the United Kingdom of Great

"Britain and Northern Ireland." "'Share Unit' means 'the ordinary shares specified in the First Schedule to this Deed with only such changes therein as are provided for in 'this Deed.'" "The managers" and "the trustee" were respectively defined as the plaintiffs or their successors and the first defendants or their successors.

Cl. 23: "If the managers shall certify in writing to the trustee that in the opinion of managers: (E) Any fundamental change has been made in the rights attaching to any ordinary shares of any company: and shall at the same time require the trustee to sell the ordinary shares of such company . . . the trustee shall sell those shares."

Clause 27: "The trustee shall as soon as practicable sell and convert into cash all ordinary shares and securities received by it in respect of any unit (other than ordinary shares forming the share unit and fully paid bonus ordinary shares which the trustee is expressly required to retain . . .) and if there shall be deposited with the trustee by the managers as part of any unit any property which the trustee would have been required to sell if the same had been received in respect of any existing unit the same shall also be forthwith sold and converted into cash."

Cl. 28 and 29 prescribed the manner in which the trustee should conduct any sale under the trust deed. As a result of the Transport Act, 1947, the Electricity Act, 1947, and the Gas Act, 1948, the transport, electricity and gas industries were respectively nationalized. Government stocks were or would be issued in substitution for the ordinary stocks or shares held in those undertakings. Accordingly each of the units constituted under the trust now included a holding of 770*l.* British Transport 3 per cent. Guaranteed Stock 1968/73, a holding of 295*l.* 6*s.* 3*d.* British Transport 3 per cent. Guaranteed Stock 1978/83, and a holding of 178*l.* 18*s.* 4*d.* British Electricity 3 per cent. Guaranteed Stock 1968/73. In addition each of the units included a holding of 100 Gas Light & Coke 1*l.* units of ordinary stock. This undertaking had become subject to the vesting provisions of the Gas Act, 1948, under which British Gas Stock would eventually be issued in substitution for the holding of Gas Light and Coke Company Stock. The amount of British Gas Stock to be issued by way of compensation in respect of the particular holding had not yet been determined. No British Gas Stock had therefore

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been received by the trustee. The holding of 770*l.* British Transport 3 per cent. Guaranteed Stock 1968/78 was part of the stock issued to Thomas Tilling Ltd. as consideration for the transfer to the British Transport Commission of such of that company's interests in passenger road transport and road haulage undertakings as were affected by the Transport Act, 1947. That stock was distributed by Thomas Tilling Ltd. by way of a special capital profits dividend. It was conceded that that stock stood in a different position from the other government stocks issued or to be issued.

The questions asked by the summons as amended (so far as relevant to this report) were: (1.) whether in the events which had happened the British Transport Stock and British Electricity Stock (and the British Gas Stock when issued) ought to be sold by the trustee in accordance with cl. 27, 28 and 29 of the trust deed. (2.) If the answer to question (1.) were in the negative in regard to all or any of the stocks, whether the managers were now in a position to give a certificate in writing under cl. 23. (3.) The summons further asked that under the Trustee Act, 1925, power to sell the stocks, exercisable at the request of the plaintiffs, should be conferred on the defendant bank and power to re-invest the whole or part of the proceeds of any such sale.

Question (1.) was determined for convenience by reference to the Electricity Act, 1947, the relevant provisions of the three Acts for the purposes of this question being substantially the same. The provisions of the Electricity Act, 1947, relevant to this question are s. 1 sub-ss. 1 and 2, s. 20 sub-s. 1, s. 40, sch. III, part I, para. 5, (1).

(1) The Electricity Act, 1947, s. 1, sub-s. 1: "There shall be established an authority, to be known as the British Electricity Authority, and it shall be the duty of that Authority as from the vesting date to develop and maintain an efficient, co-ordinated and economical system of electricity supply for all parts of Great Britain except the North of Scotland District, and for that purpose" to fulfil certain specified activities.

Sub-s. 2: "There shall be established Boards, to be

"known by the names mentioned in the first column of the First Schedule to this Act, for the areas which are described in general terms in the second column of that Schedule and are to be defined by orders made under this Part of this Act, and it shall be the duty of every such Board as from the vesting date to acquire from the British Electricity Authority bulk supplies of electricity."

S. 3: "The Central Authority and every Area Board shall be a body corporate

K. Elphinstone for the plaintiffs.

R. Walton for the defendant bank and two certificate holders who contended that the government stocks should be sold. The share unit is intended to consist solely of ordinary shares. The government stocks are "securities" within the meaning of the trust deed; cl. 27 therefore requires that they should be sold. Alternatively, if cl. 27 does not oblige the trustee to sell the stocks, then para. 5 of part I of sch. III to the Electricity Act, 1947, should be interpreted as altering cl. 27 so as to give a power to sell them.

P. Foster for a certificate holder opposing a sale of the stocks. The words of para. 5 are extremely wide. The effect of the first part of that paragraph is that the government stocks are to be held on the same trusts and subject to the same powers as the ordinary shares in substitution for which they were issued. By the second part of para. 5 the provisions of the trust deed, in particular cl. 27, which would be inconsistent with the retention of these stocks, are to be regarded as modified to achieve the objects of the first part of the paragraph. Accordingly the government stocks should be retained as part of the portfolio.

"with perpetual succession and
"a common seal and power to
"hold land without licence in
"mortmain."

Section 20, sub-s. 1: "Every
"holder of securities of any body
"to whom this Part of this Act
"applies, not being securities of
"a local authority or a composite
"company, shall be entitled to
"be compensated by the issue
"to him by the Central Authority,
"in accordance with the provi-
"sions of the Third Schedule to
"this Act, of British Electricity
"Stock of such amount" as
calculated under the Act.

Schedule III, Part I,
para. 5: "Where the holder of
"any securities becomes, under
"this Part of this Schedule,
"instead the holder of British
"Electricity Stock, he shall hold
"that stock in the same right
"and on the same trusts and
"subject to the same powers,

"privileges, charges, restraints
"and liabilities as those in, on
"or subject to which he held
"those securities, and any pro-
"vision of any deed, will,
"disposition or other instrument,
"and any statutory provision
"as to what is to be done by
"the holder of the securities or
"the redemption moneys thereof,
"shall, with any necessary
"modifications, have effect in
"relation to the said stock as it
"would have had effect in relation
"to the securities if they had
"not been extinguished."

Section 40: "(1) The Central
"Authority: . . . (b) shall
"create and issue such stock as
"is required for the purpose of
"satisfying any right to
"compensation . . . and the
"stock so created and issued is
"in this Act referred to as British
"Electricity Stock . . ."

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WYNN-PARRY J. [stated the facts and continued:] The question which now emerges is whether government stocks (for this purpose treating the gas stock as if it had been issued) are to be regarded as being in all respects substituted for the ordinary stock in respect of which they have been issued, or whether they are to be regarded strictly as government stock; and in the latter event what is the impact of that position on cl. 27 of the trust deed?

I do not entertain any doubt that the government stocks in question do not fulfil the definition of "ordinary share" in cl. 1 of the trust deed. They do, in my view, fulfil the definition of "security" in cl. 1 of that deed. I also think that the statutory corporations set up by the respective Acts fulfil the definition of "company" in cl. 1 of the trust deed. Further, in my view, if the government stock received and to be received under the provisions of those three Acts is to be regarded for all purposes of the trust deed not as ordinary shares but as securities, then the argument that cl. 27 operates and the government stocks should be sold is well-founded. In my view, however, the crux of the whole matter is: what is the effect and true meaning of para. 5 of part I. of sch. III. to the Electricity Act, 1947. It will be observed that, so far as the first part of that paragraph is concerned, it is couched in very wide language, for it provides that the holder of British Electricity stock which is issued to him in place of securities previously held by him is to "hold" that stock in the same right and on the same trusts and "subject to the same powers, privileges, charges, restraints" and liabilities as those in, on or subject to which he held those "securities" Pausing there, it appears to me that the intention and effect of the paragraph is to place the holder of the substituted electricity stock in the same position, as regards that stock, as he was previously in as regards the securities in substitution for which the electricity stock was issued. I therefore proceed to the second part of the paragraph to see whether that confirms my reading of the intention of the draftsman as expressed in the first part of the clause, or whether it contains any matter to displace that interpretation.

In my view I find confirmation of, and no matter to displace that interpretation. The paragraph continues: "and any provision of any deed, will, disposition or other instrument, and any statutory provision as to what is to be done by the holder of the securities or the redemption moneys thereof,

“ shall, with any necessary modifications, have effect in relation to the said stock as it would have had effect in relation to the securities if they had not been extinguished.”

The object of that latter part of the paragraph, as it appears to me, is that the draftsman has continued his paragraph in order expressly to resolve any doubt that might otherwise have been felt as to what was to be the position under some written provision whatever be its nature, if that written provision were to some extent in conflict with the first part of the paragraph. He expressly provided, as I read the second part of the paragraph, that the written provision (in this case the trust deed) is to be read as modified, so far as is necessary, to enable the object of the paragraph as expressed in the first half thereof to be achieved. That, I think, appears clearly from the words “ shall, with any necessary modifications, have effect in relation to the said stock as it would have had effect in relation to the securities “ if they had not been extinguished.” The position must be regarded as it would have been if the securities had not been extinguished.

In place of the ordinary shares in question which formed part of the unit, there is issued, or is to be issued, government stock which is to be regarded, therefore, as part of the unit. To the extent that there exist in the trust deed provisions which would be inconsistent with the retention of the substituted stock as part of the unit, those provisions are to be treated as being modified.

In my view, therefore, question 1 in the amended summons must be answered in the negative, except in relation to the 770*l.* British Transport 3 per cent. Guaranteed Stock 1968/73, which must be sold.

Argument was then heard on question (2.) of the summons.

Walton. It is in my interest to say that the managers are now in a position to issue a certificate under cl. 23 (E). The rights attaching to the ordinary stock in the gas undertaking are at the present time governed by para. 2 of part II of sch. II to the Gas Act, 1948 (1). It is clear on reading that

(1) The Gas Act, 1948, sch. II, pt. II, para. 2: “ During the period beginning with the vesting date and ending immediately before the conver-

sion date, the securities to which this Part of this Schedule applies shall, notwithstanding the dissolution of the bodies by whom the securities were

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paragraph that the rights attaching to securities coming within it are fundamentally different from those which attached to them before nationalization. Similarly the rights which attach to the government stocks already issued are "fundamentally" different from those enjoyed in respect of the ordinary shares for which they were issued. The managers are therefore in a position to give a certificate under cl. 23 (E).

Foster. It is submitted that the managers are not in a position to give a certificate under cl. 23 (E) in respect of the gas stock or the government stocks. The gas stock, until the actual issue of the government stock, is still gas stock, and accordingly there is not a fundamental change sufficient to justify a certificate under cl. 23 (E). In view of the finding under question (1.) it cannot now be argued that the rights attaching to government stocks are fundamentally different from those attaching to the ordinary shares held in the undertakings which have been nationalized.

WYNN-PARRY J. The second question has to be answered on the basis that and to the extent to which question (1.) was answered in the negative: "Whether in the events which have happened the managers are now in a position to give a certificate in writing under cl. 23 of the trust deed in relation to the transport stock or the electricity stock, or in relation to the Gas Light & Coke Company *1l.* units of ordinary stock, or in relation to the British Gas Stock when issued in substitution for those units of ordinary stock, and to require any of those holdings to be sold." [His Lordship read cl. 23 (E) of the trust deed and continued:] I propose to deal first with the position of the *1l.* units of ordinary stock of the Gas Light & Coke Company *Ld.* The present somewhat nebulous position as regards those securities is to be found on a perusal of para. 2 of part II. of sch. II to the Gas Act, 1948.

"issued, continue to exist and
"may be transferred, and the
"Gas Council shall keep the
"registers or other records of
"the holders of those securities,
"but the only rights which shall
"attach to those securities shall
"be—(a) the right to have
"instead British Gas Stock
"which attaches to the securities

"by virtue of the next following
"paragraph; and (b) the right
"to the payment of interest
"which attaches to the securities
"under paragraph 5 of this Part
"of this Schedule; and all other
"rights attaching to the securities
"shall, by virtue of this Act, be
"extinguished on the vesting
"date."

Of course, to some extent a fiction is employed, but the language of the paragraph, in my judgment, is perfectly plain. Taking one's stand at this date, that is, after the Act has come into force but before the British Gas Stock has been issued as compensation for the 1*l.* units of ordinary stock of the Gas Light & Coke Company *Ld.*, it is true that there has been a fundamental change made in the rights attaching to those units of ordinary stock of the Gas Light & Coke Company *Ld.* Therefore, as regards those units of ordinary stock, in my judgment the managers are, if they so desire, in a position to give a certificate in writing under cl. 23 of the trust deed.

As regards the transport stock and the electricity stock, and also the British Gas Stock when issued—and I include the British Gas Stock upon the basis that the managers may not exercise the discretion under cl. 23 to which I have just referred—the position is different. The transport stock and electricity stock have already been issued. No such point as has been successfully taken in regard to the Gas Light & Coke Company 1*l.* units of ordinary stock was taken as regards the Great Western Railway ordinary shares under the Transport Act or the electricity company's ordinary shares under the Electricity Act. Although in one sense it is true to say that there has been a fundamental change in those ordinary shares having regard to the circumstance that the British Transport Stock and the British Electricity Stock have been issued in respect of those shares, it is now, in my judgment, too late for any such point to be taken as regards those stocks. Such a point could only be taken if in the future it could be postulated that a fundamental change had been made in the rights attaching to the British Transport Stock and the British Electricity Stock or either of them. The same reasoning, in my view, will apply to the British Gas Stock when issued.

The court then heard argument on question (3.).

Elphinstone. The court has power under s. 57 of the Trustee Act, 1925 (1) to empower the trustee to sell the stocks. The

(1) By s. 57, sub-s. 1, of the Trustee Act, 1925: "Where in the management or administration of any property vested in trustees, any sale . . . is in

"the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the

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ambit of s. 57 is very wide and this is clearly a case within the scope and intention of the section. It is expedient for the "management and administration" of the trust property that the trustee should be able to sell those stocks in order that he can carry out the purposes of the trust as defined in the trust deed. These stocks are not of the type contemplated by the trust deed, and should be sold. The court should give the trustee power to sell the stocks and reinvest the proceeds in the type of security defined in the trust deed.

Walton. The court has jurisdiction to grant a power of sale under s. 57. The question is whether it is expedient so to do. It is submitted that it would be expedient to make an order under the section. The government stocks are not the type of security which it was intended that the trustee should hold under the trust deed, and the trustee should be empowered to sell them. The court should not, however, order reinvestment of the proceeds of sale of these stocks. Such an order would not be justified under the trust deed. The proceeds should be distributed.

Foster. Section 57 does not apply in this case because there is already a power of sale vested in the trustee under the trust instrument: *In re Pratt's Will Trusts* (1). If this be wrong, it would not be expedient to make an order under s. 57: *In re Thomas* (2).

WYNN-PARRY J. The next question which I have to decide is raised in this way. The summons asks that there may be conferred on the trustees, so as to be exercisable at the request of the managers for the time being of the trust, a power to sell the stocks issued under the three Acts in question, as to which I have held that, on the terms of the trust deed as it stands, there is no power to sell. It is further asked that there be a general power to sell all or any other stocks or securities, if any, which may from time to time hereafter be received by the trustee, so as to form part of a unit pursuant to any statutory provisions for compensation. That is a power looking to the future and anticipating further possible schemes for nationalization. It is further asked that power shall be

"trustees by the trust instrument, "necessary power for the
"if any, or by law, the court "purpose . . ."

"may by order confer upon the (1) [1943] Ch. 326.

"trustees, either generally or in (2) [1930] 1 Ch. 194, 198.

"any particular instance, the

given to reinvest, not only the net proceeds of the sale of any of the stocks coming within the purview of the power of sale to which I have referred, but also the whole or part of the net proceeds of any sale of investments or rights effected in accordance with the existing provisions of the trust deed and the supplemental trust deeds, in a manner set out in detail in this question. That manner, in effect, would involve investing the proceeds in buying further ordinary shares of the holding which at the time of the proposed investment was the smallest in value of the holding of ordinary shares comprised in each unit, and so on upwards with a view to achieving, so far as possible, a perfect balance in the spread among the investments constituting the units.

The first point which I have to decide is whether there is jurisdiction in the court under s. 57 of the Trustee Act, 1925, to make an order, giving authority to sell or authority to reinvest. The section is couched in wide language and there is little guidance in the reported cases, a circumstance which, of course, is explained by the fact that most applications under this Act are heard in Chambers. It appears to me that there must be some limit to the scope of this section. It cannot be construed as having such wide import as would allow a complete re-writing of a trust deed or a substitution of a completely different object from that for which the trust was brought into being.

I find support in that view that there must be some limit to the scope of the section in the opening words, which are: "Where in the management or administration of any property vested in trustees" If those words, "management or administration" are to have no significance, it would have been the easiest thing in the world for the section to have opened with the words: "Where any property is vested in trustees" I do not intend for one moment, and I must not be taken as intending, to attempt to state what in my view is the exact scope of the section. I cannot see that I should be doing any service by embarking on any such attempt. It is very much better that each case as it comes up should be considered separately; but for the present purpose I do feel that I have to consider whether this application is one which I have jurisdiction to entertain upon the view which I take, that the words "management or administration" at the beginning of the section have a limiting effect upon the jurisdiction conferred upon the court.

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The resulting position, on the view which I have expressed in answer to question (1.), is that there is now contained in each unit a certain holding in the compensation stocks issued or to be issued under the three Acts in question, and that those compensation stocks are now to be regarded for all purposes as forming part of the unit. It is true, looking only at the trust deed, that the presence of those stocks as part of the unit is foreign to the policy of the trust deed. According to the view which I have expressed, that is the effect of the policy and the language of the Acts in question.

Giving the matter the best consideration I can, I cannot see that the continued holding of these compensation stocks can raise any question of difficulty or real inconvenience in relation to the management or administration of the property subject to the trust, or in carrying out the trust. It is impossible in those circumstances to say that the mere fortuitous circumstance that as the result of the three Acts in question there is now in each unit stock not of the nature originally contemplated but which by the effect of the Acts of Parliament is to be deemed for all purposes to be ordinary stock and held as part of each unit, gives the court jurisdiction to make an order under this section, the object of which is to eliminate those stocks or any of them from the portfolio of the trust, particularly in view of the circumstance which I have already mentioned—that I am unable to see that any considerations of difficulty or inconvenience can arise.

There appears to me to be a second objection to the invocation of the jurisdiction under this section, namely, the second point argued by Mr. Foster. The section contains these words: “. . . but the same”—that is, any one of the transactions previously specified—“cannot be effected “by reason of the absence of any power for that purpose “vested in the trustees by the trust instrument.” There is a power of sale expressly conferred on the trustees under the trust deed in specified circumstances, although the particular power of sale asked for by this summons is absent. In *In re Pratt's Will Trusts* (1) Morton J. had to consider a somewhat similar question. In that case: “A testatrix bequeathed “to her executors and trustees certain shares and the “dividends and income accruing therefrom at her death “on trust to pay the dividends or income thereof to “her nephew for life and then, as to both income and

(1) [1943] Ch. 326.

“capital, on trust for other persons. The will contained no express trust for sale: *Held*, that the shares were ‘trust funds . . . in a state of investment’ in the hands of the trustees, within the meaning of s. 1, sub-s. 1 of the Trustee Act, 1925, and that the wording of that subsection was wide enough to give to the trustees a power to sell the shares,” and therefore in the result s. 57 of the Trustee Act, 1925, could not be invoked.

Morton J. having discussed the first question, namely, whether s. 1, sub-s. 1 of the Trustee Act applied, and having held that it did, said (1): “The result is that in the present case the trustees have a power of sale. I cannot, therefore, make the order which is asked under s. 57 of the Trustees Act, 1925, because the words ‘by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law’ are not applicable to the case.” It appears to me that that reasoning applies equally here, and in my judgment for those two reasons s. 57 of the Trustee Act, 1925, cannot be invoked in this case.

The matter may be taken further, and, in case I should be held by a higher court to have taken a wrong view upon the question of jurisdiction, I will, for the assistance of any higher court, state what I would have decided, if, contrary to my own view, I had had jurisdiction to entertain this question. As regards the proposed power of sale it was strongly urged upon me that a perusal of the trust deed disclosed that the whole underlying policy of the trust and the main object with which it was brought into existence was that there should be held ordinary shares and nothing other than ordinary shares, and that therefore it could be said to be expedient that these holdings of compensation stock should be sold.

Here again I have to take into consideration the circumstances, that as a result of the deliberate policy of Parliament, achieved by the relevant provisions of the three Acts in question, the compensation stock has become part of the portfolio of the trust deed and is to be regarded, substantially speaking, as being for all purposes part of the unit, and that there is no real difficulty or inconvenience likely to be encountered in giving effect to that policy. In these circumstances a case is not made out to my satisfaction that it is expedient that any of those stocks should be sold. Therefore, had I arrived at the conclusion that I had jurisdiction under

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s. 57, I should not have exercised that jurisdiction. It follows, therefore, a fortiori, that I should not in any event have been prepared to authorize any power of reinvestment. In this connexion I would add that in no circumstances can I see that any case has been made out for describing as expedient the introduction of a power to reinvest the whole or any part of the net proceeds of any sale of investments or rights effected in accordance with the existing provisions of the trust deed.

Declarations accordingly.

Solicitors : *Linklaters & Paines ; Slaughter & May.*

I. G. R. M.

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Dec. 12, 21.

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[1951] 1 Ch. 193

In re SCARISBRICK, *Reversed.*
[1951] 1 Ch. 622

COCKSHOT v. PUBLIC TRUSTEE.

[1949 S. 1495.]

Charity—Will—Bequest of part of residue for "such relations" of the son and daughters of the testatrix "as in the opinion of the survivor" of [them] shall be in needy circumstances"—Validity.

A testatrix, in disposing of her residuary estate, directed her trustees, after the death of her son and two daughters, to whom the income was to be paid during their lives in manner therein mentioned, to "hold the same upon trust for such relations of my "said son and daughters as in the opinion of the survivor of my "said son and daughters shall be in needy circumstances" and for certain specified charitable objects "for such interest and in "such proportions and manner in every respect as the survivor of "my said son and daughters shall by deed or will appoint." The power of appointment was not exercised.

Held, that, on the authorities, the recipients under this bequest could not be regarded otherwise than as beneficiaries under a family trust; that they did not constitute a particular section of the poor; and that there must be a declaration that one half of the residuary estate and no more was effectively devoted to charity.

Attorney-General v. Price (1810) 17 Ves. 371; *In re Compton* [1945] Ch. 123, applied.

Gibson v. South American Stores (Gath and Chaves) Ltd. [1949] Ch. 572; (C. A.) ante, p. 177, considered.

ADJOURNED SUMMONS.

By cl. II of her will dated July 27, 1911, the testatrix, Dame Bertha Petronella Scarisbrick, who died on April 28, 1915, devised and bequeathed all her real and personal estate in the United Kingdom of Great Britain and Ireland and in the British Dominions beyond the seas not thereby otherwise disposed of on trust to pay the income in equal shares to her two daughters during their joint lives and to the survivor of them during her life and after the death of the survivor of them to pay the same income to her son during his life; and she directed that after the death of her daughters and son the trustees for the time being of the will should "hold the same upon trust for such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances and for such charitable objects either in Germany or in the United Kingdom of Great Britain and Ireland (preferably charitable objects connected with the Roman Catholic Church and faith) for such interests and in such proportions and manner in every respect as the survivor of my said son and daughters shall by deed or will appoint."

The testatrix's son died on May 18, 1933. One of her daughters died on July 2, 1940, and the surviving daughter died on May 12, 1948. The power of appointment was not exercised. The trustees of the will took out a summons to determine (*inter alia*) whether, in the events which had happened, the residuary estate ought as to one half or some part thereof to be treated as a valid charitable gift and applied *cy-près*, and, as to the remainder thereof, ought to be treated as undisposed of, or how, otherwise, it ought to be dealt with.

Lionel Edwards for the plaintiff trustees.

W. M. Hunt for the Public Trustee. The testatrix is not contemplating charity at all in making this disposition for the benefit of poor relations. As to whether such a gift is charitable or not, see *Thomas v. Howell* (1); see also Farwell on Powers 3rd ed., p. 573. It is impossible to read this as a charitable bequest: it is a private gift to such relations of the son and daughters of the testatrix as shall be in needy circumstances. One half of the gift may be charitable, but the other half is not. [Counsel also referred to *Salisbury v. Denton* (2).]

Denys Buckley for the Attorney-General. Poverty in the

(1) (1874) L. R. 18, Eq. 198, 207. (2) (1857) 3 K. & J. 529.

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first part of this bequest means poor persons ; a gift to poor relations is charitable : see Tudor on Charities, 5th ed., p. 26. In some cases the court has translated relations into statutory next of kin. Poor relations are poor statutory next of kin. The gift here is charitable : see Tyssen on the Law of Charitable Bequests, 2nd ed., p. 61 ; Theobald on Wills, 10th ed., p. 271 ; Jarman on Wills, 7th ed., p. 1607 : *In re Compton* (1), and *In re Hobourn Aero Components Ltd's Air Raid Distress Fund* (2). Where a power such as that in the present case exists, the donee of the power has, according to the authorities, power to take as wide a view as he likes, so long as the object is a blood relation. The relief of poverty is a public benefit. [*Gibson v. South American Stores (Gath and Chaves) Ltd.* (3) ; *A.-G. v. Buckland* (4) ; *Brunsdon v. Woolredge* (5) ; *Widmore v. Woodroffe* (6) ; *Mahon v. Savage* (7) ; *A.-G. v. Price* (8) ; and *Griffith v. Jones* (9) referred to.]

If the present case is governed by the authorities which relate to perpetual gifts to poor relations, the court must follow them. This case clearly falls under the principle of perpetual gifts. The court must consider not how long the gift will last, but what is the ambit of it at any particular moment.

This is a trust for any member of the public who can satisfy two conditions, namely, that he is poor, and that he is a blood relation of the daughters and son of the testatrix. No limit to the class can be placed by the court. The court should not set too much store by the dicta in *A. G. v. Price* (8).

Hunt replied.

Cur. adv. vult.

Dec. 21. ROXBURGH J. [reading his judgment, stated the facts and continued :] It appeared early in the argument that there might be some conflict between the heir at law, who was represented by counsel, and other persons who were not represented, as to the destination of any part of the fund not effectually given to charity, and it was thereupon agreed

(1) [1945] Ch. 123.

(2) [1946] Ch. 194, 204.

(3) [1949] Ch. 572 ; ante, p. 177

(4) (1742) Amb. 71.

(5) (1764) Amb. 507.

(6) (1766) Amb. 636.

(7) (1803) 1 Sch. & Lef. 111.

(8) (1810) 17 Ves. 371.

(9) (1687) 2 Rep. Ch. 179.

that my decision should be confined to the question whether the whole, or, if not, how much, of the fund was thus effectually given. The bequest plainly falls into two parts, and the second part is admittedly charitable.

The essential features of the first part of the bequest are that its objects are relations of the son and the two daughters of the testatrix "in needy circumstances"; that the survivor of the son and daughters is to determine which relations are in fact objects of the bounty and also which members of that class are to receive it; and that distribution is to be made on the death of the survivor once and for all. I cannot escape by way of construction from the maze of authority which lies ahead.

The trend of authorities down to 1929 is well summarized in Tudor on Charities, 5th ed., pp. 26 and 27. At p. 26, the author says: "Trusts for the benefit of poor relations, 'kinsmen, or descendants exceeding the limit allowed by the rules of remoteness are upheld as charities.'" At p. 27, he says: "As regards gifts intended for immediate distribution the decisions are conflicting. In some cases 'it has been held that a gift for 'poor kindred' or poor relations, like a gift for 'relations,' is to be confined to the statutory next of kin, on the footing that such a gift, not being charitable, would be void for uncertainty were it not so restricted. On the other hand, there have been several cases in which such gifts have been charitable and not confined to statutory next of kin. And Lord Hardwicke is said to have observed in *A.-G. v. Buckland* (1), that where a bequest is to relations it is to be confined to next of kin, but where it is to 'poor' relations the construction has been more large, and has been extended to those who were of kin and objects of charity. The sounder view is thought to be that a gift for immediate distribution among poor relations, kindred, and so forth, is charitable, except in cases where the intention of the donor, derived from the construction of the documents, is to confine the benefit of the gift to statutory next of kin. Outside this limit no line can be drawn and the objects ought not to be treated as less extensive where the gift is for immediate distribution than where a perpetual trust is intended." That view, however, was expressed before the decision of the Court of Appeal in *In re Compton* (2).

(1) (1803) 1 Sch. & L. 112, n. (2) [1945] Ch. 123.

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If I am free to apply the principles laid down in *In re Compton* (1), and expressly stated to apply to all categories of charity, I shall be in no doubt. "No gift can be charitable in the legal sense unless it is of the necessary public character"—per Lord Greene M.R. (2). "The proposition is true of all charitable gifts When I come to deal with the 'poor' 'relations' cases it will be found that a hundred and fifty years ago the essential nature of this requirement was perhaps not as clearly appreciated as it is today." Lord Greene M.R. then gave illustrations of gifts which are wanting in the necessary public character, and one of the illustrations seems to me to be this case, that is, "when the claimants, in order to establish their status, have to assert and prove that they stand in some specified relationship to the individuals A. B. C. D., and E. F. In such a case," he says (3), "a purely personal element enters into and is an essential part of the qualification, which is defined by reference to something, i.e., a personal relationship to individuals or an individual which is in its essence non-public." The whole court agreed with this judgment, which in principle decides the point before me against charity. The same principle would, however, decide all "poor relations" cases against charity, and in a later part of his judgment Lord Greene M.R. discussed some of these cases in this passage (4) which I must read in full: "I must now turn to the 'poor' 'relations' cases on the analogy of which Cohen J. felt himself constrained, against his own view, to decide against the next of kin. The authorities relied on by the respondent are as follows. In *Isaac v. Defriez* (5) the gifts were a gift of two annuities to the poorest relations of the testator and of his wife; a gift of income to one poor relation of the testator for a portion in the way of marriage and putting him or her out in the world, and a similar gift of income to one poor relation of his wife. These gifts were upheld as good charitable gifts, but no reasons for the decision appear in the report. This case was followed in *A.-G. v. Price* (6), where the gift was in favour of the testator's 'poor kinsmen and kinswomen and their offspring and issue which shall dwell in the county of Brecon.' Sir William Grant M.R. followed *Isaac v. Defriez* (5) saying: 'This seems to be

(1) [1945] Ch. 123.

(2) Ibid. 129.

(3) Ibid. 130.

(4) Ibid. 137.

(5) (1754) Amb. 595.

(6) 17 Ves. 371.

“ just as much in the nature of a charitable bequest as that.
 “ It is to have perpetual continuance, in favour of a particular
 “ description of poor ; and is not like an immediate bequest
 “ of a sum to be distributed among poor relations.’ In an
 “ earlier case, *White v. White* (1), Sir William Grant had
 “ supported as charitable a gift by a testatrix for the purpose
 “ of putting out ‘ our poor relations ’ as apprentices. By
 “ a codicil this gift was confined to two families. Sir William
 “ Grant appears to have thought that the case was similar
 “ to an earlier case of his own where ‘ a great number of Jews
 “ were the objects ’ ; such a gift would no doubt be regarded
 “ to-day as satisfying the well-established rule that a good
 “ charitable gift must be for the benefit of the public or a
 “ section of the public, a test which Sir William Grant does not
 “ appear to have taken into consideration in *White v. White* (1)
 “ or in *A.-G. v. Price* (2). *Bernal v. Bernal* (3) was a case in
 “ which the only matter decided arose on the construction
 “ of a will providing for poor relations who were in fact (as
 “ the will was construed) the male descendants of certain
 “ named relatives of the testator. It appears from the
 “ petition (4) that the gift was established as a charity under
 “ a decree of December 9, 1728. What the reasons were for
 “ the decision in that behalf does not appear, and when the
 “ question of construction was raised in 1838 before Lord
 “ Cottenham L.C. there was no issue as to the charitable
 “ nature of the bequest. In *Browne v. Whalley* (5), where
 “ the gift was for the relations of the testator ‘ who might
 “ happen to be in want or fall to decay,’ the charity had
 “ similarly been established by a decree of the year 1763.
 “ In *Gillam v. Taylor* (6) the gift was in favour of such of the
 “ lineal descendants of the testator’s maternal uncle as they
 “ might severally need. This was held to be a good charitable
 “ gift on the authority of *Isaac v. Defriez* (7) and *A.-G. v. Price*
 “ (2). In *A.-G. v. Duke of Northumberland* (8) the will, as
 “ construed by Sir George Jessel M.R., was in favour of poor
 “ persons generally with a preference for poor persons who
 “ were kindred to the testator, and in that respect the case
 “ was similar to the ‘ founder’s kin ’ cases. But Sir George
 “ Jessel in his judgment referred to *Isaac v. Defriez* (7) and

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(1) (1803) 7 Ves. 422.

(2) 17 Ves. 321.

(3) (1838) 3 My. & Cr. 559.

(4) *Ibid.* 565.

(5) [1866] W. N. 386.

(6) (1873) L. R. 16 Eq. 581.

(7) *Amb.* 595.

(8) (1877) 7 Ch. D. 745.

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" *A.-G. v. Price* (1) and did not cast doubt on the correctness
" of those decisions. From this review of the authorities it
" will be seen that they are really all derived from *Isaac*
" *v. Defriez* (2) and *A.-G. v. Price* (1). We are invited to
" overrule them. I agree that they are far from satisfactory,
" and the original decisions were given at a time when the
" public character of a charitable gift had not been as clearly
" laid down as it has been in more modern authorities. If the
" question of the validity of gifts of this character had come
" up for the first time in modern days I think that it would
" very likely have been decided differently on the ground
" that their purpose was a private family purpose, lacking
" the necessary public character, but it is in my view quite
" impossible for this court to overrule these cases. Many
" trusts of this description have been carried on for generations
" on the faith that they were charitable, and many testators
" have no doubt been guided by these decisions. The cases,
" must at this date be regarded as good law, although they are
" perhaps, anomalous.

" In these circumstances the question arises whether we
" ought to extend the analogy of these decisions, so as to
" cover a trust of the kind now in controversy. Taking the
" view which I have already expressed, I do not think that we
" are bound, or ought, to do so. There may perhaps be
" some special quality in gifts for the relief of poverty which
" places them in a class by themselves. It may, for instance,
" be that the relief of poverty is to be regarded as in itself
" so beneficial to the community that the fact that the gift
" is confined to a specified family can be disregarded : whereas
" in the case of an educational trust, where there is no poverty
" qualification, the funds may at any time be applied for the
" purpose of educating a member of the family for whose
" education ample means are already available, thus providing
" a purely personal benefit and one freed, incidentally, from
" the burden of income tax. Failing such a ground of distinction,
" I can only regard the ' poor relations ' cases as anomalous,
" and I prefer to let them remain as such rather than to
" extend the anomaly to a different class of case."

Though Lord Greene M.R. cited *A.-G. v. Price* (1), and the observation of Sir William Grant M.R. in his judgment that " it is to have perpetual continuance, in favour of a particular description of poor; and is not like an immediate

(1) 17 Ves. 321.

(2) Amb. 595.

"bequest of a sum to be distributed among poor relations," it was not necessary for him to discuss the validity of this distinction or the conflict of authority existing with regard to the second class of case, and he did not do so. He declined to overrule the cases cited to him, all of which seem to belong to the first class, mainly by applying the principle of *stare decisis*.

No such principle can be applied to the present case. The decisions where there is no perpetuity have long been conflicting. Many of these have been cited in argument, but I need not recapitulate them, because their general purport is accurately stated in the passage which I have read from Tudor on Charities, and little, if any, further light can be obtained from a study of the reports. All that is clear is that the decisions are conflicting. Accordingly there is here no room for the principle of *stare decisis*.

Lord Greene M.R., did not, however, finally decide that the perpetual trusts for poor relations cited to him could only be allowed to stand on this principle. He said: "There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded." Lord Greene M.R. said "may be," not "is."

It seems that none of the "poor relations" cases has ever been avowedly based on any such principle, but Harman J. in *Gibson v. South American Stores (Gath and Chaves) Ltd.* (1), formally adopted it. In the Court of Appeal, on the other hand, Evershed M.R., expressed reservations in which the whole court concurred. He said (2): "I feel it right, therefore, in case the matter is hereafter considered in a higher court, to say that I must not be taken to accept the view that the ground for justifying such decisions as the 'poor relations' cases is, as Harman J. expressed it: 'The explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories.' I think, as Lord Greene M.R. stated in *In re Compton* (3), that that may be an explanation. On the other hand, it may be that they simply must be regarded now as a well-established anomaly. I find it

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(1) [1949] Ch. 572; ante, p. 177. (3) [1945] Ch. 123.

(2) Ante, p. 197.

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"unnecessary in the circumstances to say any more or to express a view one way or another whether the principle to which Harman J. referred should be treated as well established, or whether the three cases, *Spiller v. Maude* (1), *In re Gosling* (2) and *In re Buck* (3), ought now to be regarded as rightly decided. I think, so far as I am concerned, that "this question"—that is the question before the court in *Gibson's* case (4)—"has been determined by *In re Sir Robert Laidlaw* (5), on grounds which are not apparent, and I loyally follow them without affirming or disaffirming any of the "grounds relied on by Harman J."

Neither the Court of Appeal in *In re Compton* (6), nor Harman J. nor the Court of Appeal in *Gibson v. South American Stores* (4), when considering whether gifts for the relief of poverty have some special quality, took account of the distinction drawn by Sir William Grant in *A.-G. v. Price* (7) between trusts to have perpetual continuance in favour of a particular description of poor and immediate bequests for distribution among poor relations. Yet this distinction has stood without challenge almost as long as the poor-relations cases themselves, and it is only trusts of the former class which have enjoyed uniformity of decision. As I have a case akin to the latter class, I have to decide whether I am going to reject the distinction drawn by Sir William Grant and assimilate the two classes of case, or whether I am going to apply to the latter class the principles laid down in *In re Compton* (6) and thus resolve the conflict of authority.

It seems to me impossible to hold that in all cases of gifts for immediate distribution among poor relations the relief of poverty has some special quality which provides the necessary public character. It could not, for instance, convert a trust for the testator's children in needy circumstances into a public trust. Accordingly a line must be drawn somewhere. This Mr. Buckley concedes, and he also concedes that the decision in *Gibson v. South American Stores* (4) would not necessarily render charitable a gift by the will of a proprietor of a business for immediate distribution among poor employees. But he will have nothing to do with the distinction drawn by Sir William Grant. He draws attention to the difference in

(1) (1881) 32 Ch. D. 158.

(2) [1900] W. N. 15.

(3) [1896] 2 Ch. 727.

(4) [1949] Ch. 572; ante p. 177

(5) Unrep.: (1934) L. No. 192.

(6) [1945] Ch. 123.

(7) 17 Ves. 371.

emphasis between a gift to a limited class of very near relations, where, as he submits, the motive of personal relationship must be paramount to the motive of the relief of poverty, and a gift to an uncertain class extending to distant relations where, as he submits, the motive of relief of poverty must be paramount; and out of this difference of emphasis he evolves a principle of construction, namely, that the court will decree any gift to poor relations (whether immediate or perpetual) to be charitable if the relief of poverty appears to be the dominant motive.

I do not see how the necessary public character of a trust could depend on any principle of construction, least of all on one based on the presumed motive of the donor. Moreover, Mr. Buckley's argument runs counter, not only to Sir William Grant's distinction between perpetual gifts and gifts for immediate distribution, but also to the reasoning of Lord Greene M.R. in *In re Compton* (1), because his Lordship deliberately refused to found any distinction in principle on the difference in emphasis to which Mr. Buckley refers. Lord Greene M.R., said (2): "The fact that in cases where a personal element forms an essential part of the qualification the numbers involved may be large does not appear to me to make any difference to the principle to be applied. Once that element is present numbers can make no difference. The gift is in such a case a personal gift. It may, of course, fail for uncertainty, but that is neither here nor there." The whole Court of Appeal concurred, and therefore Mr. Buckley's argument must fail in this court. I cannot accept his proposed test, merely observing in passing that, if I had to apply such a test, I should not in the present case hold that relief of poverty was the paramount motive.

It is indeed doubtful whether the distinction drawn by Sir William Grant is as a whole consistent with the reasoning of Lord Greene M.R., but at any rate that part of it which relates to immediate bequests is in full accord. In the case of gifts for poor relations having perpetual continuance, the courts have, rightly or wrongly, uniformly regarded the necessarily fluctuating body of recipients, not as a class standing in a personal relationship to the testator, but as constituting a particular section of poor people. But where the distribution among poor relations is to be completed within the period allowed by the rule against perpetuities, there is no such

(1) [1945] Ch. 123.

(2) Ibid. 131.

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uniformity ; and to regard such recipients, not as beneficiaries under a family trust, but as a particular section of the poor, would, in my judgment, be to defy, not only Sir William Grant, but also the Court of Appeal in *In re Compton* (1). It has been conceded that, if this should be my decision, one half of the residuary estate and no more is effectively devoted to charity, and I so declare.

Solicitors : *Pritchard, Englefield & Co ; Treasury Solicitor.*

(1) [1945] Ch. 123.

J. L. D.

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Nov. 17, 25.

DOLLAR v. WINSTON AND ANOTHER.

[1949.—D. 206.]

Landlord and tenant—Covenant not to assign without landlord's consent—Consent not to be unreasonably withheld—Withholding by landlord of consent in order to preclude statutory tenancy—Whether reasonable.

It is not unreasonable for a landlord to refuse consent to assign or underlet where the sole purpose of the assignment or underletting is to bring the tenancy within the operation of the Rent Restriction Acts. Accordingly, a tenant who underlets or assigns after the landlord has refused consent in the above circumstances will commit a breach of a covenant not to assign or underlet without consent, whether or not the tenant is in possession of the premises at the time of the purported assignment or underletting. *Swanson v. Forton* [1949] Ch. 143, followed.

ACTION.

By a memorandum of agreement dated March 1, 1946, and made between Morris Dollar, the plaintiff (therein called the landlord), of the one part and G. Winston, the first defendant (therein called the tenant), of the other part, the landlord demised to the first defendant a residential flat known as 23 Cleve House, Cleve Road, Hampstead, for a term of three years from March 1, 1946, at an annual rent of 160*l.* payable quarterly in advance. The premises were subject to the Rent and Mortgage Interest Restrictions Act, 1939. By cl. 2 (9) of the agreement the tenant covenanted with the

landlord: "Not to assign transfer underlet or part with possession of the said flat or any part thereof (otherwise than by underletting to a respectable and financially responsible person the entire flat) or share the occupation of the said flat or any part thereof without first obtaining the written consent of the landlord which consent shall not be unreasonably withheld Provided (a) evidence is produced satisfactory to the landlord that such assignee transferee underlessee or other person is respectable responsible and financially substantial (b) such assignee or transferee enters into direct covenants with the landlord to perform and observe all the covenants stipulations and conditions on the part of the tenant herein contained (but the entry into such covenants by any assignee or transferee shall not discharge the tenant from his/her liability to perform and observe all the covenants stipulations and conditions on the part of the tenant herein contained) and (c) a reasonable sum is paid by the tenant in respect of any legal or other expenses incurred by the landlord in connexion with the giving of such consent and to register every assignment or underlease or probate of the will or letters of administration of the estate of any tenant assignee or underlessee with the landlord or his agent within thirty days of the date of the assignment or underlease or grant of probate or administration as the case may be and will pay a fee of one guinea to the landlord or his agent in respect of such registration. Provided however that the landlord shall be entitled to withhold such consent in the case of an underletting or parting with possession at a premium where the rent to be paid by an under-tenant or occupier is less than the rent reserved by this lease." By cl. 4 (1) of the memorandum of agreement it was further provided: "That if . . . the tenant shall make default in performing and observing all and every the covenants and conditions hereinbefore on his/her part contained . . . then and in any of such cases the landlord may re-enter upon the said flat and immediately and thereupon the said term shall absolutely determine but without prejudice to the right of action of the landlord in respect of any breach of the tenant's covenants herein contained."

The landlord alleged that on or about January 24, 1949, the tenant, without first having obtained his written consent,

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assigned to the second defendant, Montague Mendal, the residue of the term of years created by the memorandum of agreement. On the following day the tenant parted with possession of the premises to the assignee without first having obtained the written consent of the landlord. On January 28, 1949, the landlord duly served on the tenant a notice complying with s. 146 of the Law of Property Act, 1925. The notice was also served on the assignee. On February 1, 1949, the solicitors acting on behalf of both defendants informed the landlord's solicitors that it was not the defendants' intention to comply with the notice.

The plaintiff sued for possession or forfeiture of the lease, and for damages for breach of covenant and the usual consequential relief. The defendants counterclaimed for relief against forfeiture under s. 146, sub-ss. 2 and 4 of the Law of Property Act, 1925.

By their defence the defendants admitted the allegations, but they pleaded that the landlord had unreasonably refused licence to assign and that accordingly the tenant was entitled to assign without licence.

The term was due to expire on February 28, 1949. Licence to assign had been asked for on December 16, 1948, and had been refused on January 10, 1949, in the following letter: "Having regard to the fact that your client's lease of the "above premises expires on March 31 next and that any "assignment of the lease now will, in all probability, result "in a statutory tenancy arising under the Rent Restriction "Acts, our client considers that it is unreasonable that he "should be asked to consent to the assignment of the eleven "weeks or so of the unexpired term. We are, therefore, "instructed to inform you that our client refuses his consent "to the proposed assignment of the lease to Mr. Montague "Mendal as suggested in your letter of December 16 last. "Our client is advised that the withholding of his consent "to assignment is, in the circumstances mentioned, reasonable "both in fact and law, and, this being the case, he has not seen "fit to pursue the references given by you in your letter of "December 16 last and sees no reason to express any opinion "as to whether, other consideration apart, Mr. Mendal would "be a suitable or satisfactory tenant." No issue arose as to the suitability or otherwise of the proposed assignee.

G. H. Newsom for the landlord. The landlord's refusal

of consent was not in the circumstances unreasonable. The lease was about to expire, and the effect of the assignment would have been to bring the letting within the Rent Restriction Acts since the tenant had found himself another flat and would be vacating the flat in question, and the assignee would be able to hold over under the Acts. The landlord did not desire this to occur. It is not unreasonable for a landlord to refuse consent where the purpose of the assignment is to bring the tenancy within the Rent Acts : *Swanson v. Forton* (1).

H. Lester. This case is distinguishable from *Swanson v. Forton* (1). Here the tenant, the first defendant, had not parted with possession of the premises. It was said in *Swanson v. Forton* (1) that the basis of the case was that the tenant had already parted with possession, and that the position was therefore different from that in *In re Swanson's Agreement* (2), where the tenant was still in possession of the premises when he made the purported assignment. It is submitted that the question whether or not a tenant has parted with possession is vital. As the tenant here was still in occupation at the time of the assignment, the case is not within *Swanson v. Forton* (1). [Counsel also referred to : *Lee v. K. Carter Ltd.* (3) and *Moat v. Martin* (4).]

Newsom in reply. It is submitted that the decision in *In re Swanson's Agreement* (2) was bad. Evershed L.J. said in *Swanson v. Forton* (5) that it probably went too far. The observation by Lord Greene M.R. in *Swanson v. Forton* (1) about the tenant's being in possession was obiter.

Cur. adv. vult.

Nov. 25. ROXBURGH J. [read the following judgment in which he stated the facts substantially as hereinbefore set out and continued:] The reason for the refusal of licence is plainly stated in the letter of January 10, 1949. The date of expiry of the tenancy is wrongly stated : there were then about seven weeks to run. The tenant was still in possession, but he had told the landlord that he had taken another flat and expected to leave in January. This was at an interview on December 13, 1948. There is an acute conflict of evidence as to what happened on that occasion. But

(1) [1949] Ch. 143, 150.

(2) (1946) 176 L. T. 25.

(3) [1949] 1 K. B. 85.

(4) [1949] W. N. 394.

(5) [1949] Ch. 143, 153.

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I am satisfied that the tenant did give the landlord to understand that he would not be in occupation of the flat when the lease expired on February 28, 1949, and that the landlord said nothing which should lead me to hold that the reasons for refusal given in the letter which I have read were not the true reasons.

Clearly the present case bears a close resemblance to *Swanson v. Forton*, decided by the Court of Appeal (1). There are two differences: one, the residue of the term in that case was to be measured in days and not in weeks; two, the tenant was not in occupation when he assigned. The question for me to decide is whether these differences should produce a different result.

The tenant did not go out of occupation till January 24, 1949, and obviously nobody would have then taken an assignment of a tenancy of an unfurnished flat which was due to expire on February 28, 1949, unless he could thus obtain the position of a statutory tenant. The tenant did not intend to remain in occupation until February 28 and had made this clear to the landlord. He was not in the least concerned about the liability for rent for the last month or five weeks, because, although the landlord had no particular desire for a surrender, he had intimated in a letter of December 19, 1948, his willingness to resume possession when the tenant left. The tenant did not pursue that suggestion.

Lord Greene, M.R., said in *Swanson v. Forton* (2): "Apart from authority and construing the undertaking in its natural meaning in relation to the facts which I have stated, I should have had no hesitation in saying that the appellant was not acting unreasonably in withholding her consent to the assignment. Under the contract the respondent had only twelve days of the term to assign. What he was attempting to do was not merely to assign the twelve days but to put his assignee in a position to obtain what he himself could not obtain, namely an extension of the right to occupy lasting beyond the expiration of the contractual term. If he himself had, contrary to his intention, returned to occupy the house so as to become a statutory tenant, he could not have assigned his statutory tenancy. By taking advantage of the fact that the contractual tenancy had twelve days to run he is attempting to do what for all practical purposes

(1) [1949] Ch. 143, 150.

(2) Ibid, 148.

“(but not, of course, in law) is the same thing.” Mutatis mutandis, those words are applicable to the present case.

There occurs this further passage in Lord Greene M.R.’s judgment, (1): “. . . in the present case the position is “that on the inference which the landlord was entitled to “make, no statutory tenancy was, in the absence of an assign- “ment, going to arise in fact.” And later he said, (2): “I see no reason for limiting the matters to be considered in “regard to reasonableness to matters which will arise during “the currency of the lease. It is the effect of the assignment “as leading inevitably to the extension of the right of occupa- “tion beyond the expiration of the contractual term that is “here objected to. The assignment would lead, in Tucker “L.J.’s words, [in *Lee v. K. Carter Ltd.*, (3)] to ‘a contractual “‘relationship pregnant with future possibilities’. I can “see no reason and I find no authority which leads me to think “that in these circumstances the landlord’s refusal was “unreasonable.” Both those passages fit the present case.

Evershed L.J. said, (4): “For reasons fully stated by “the Master of the Rolls it is in this case obvious that “the assignment of the ‘fag-end’ of the term was intended “to relate in its effect not really at all to the contractual term “but only to the period after the end of the term. Save in “relation to what should follow after the term expired, the “last twelve days of the term were without significance to “assignor or assignee. In these circumstances I think the “present case is in essence the same as that of *Lee v. K. Carter, Ltd.* (3), and that a similar conclusion should follow.” Those words also fit the present case.

Mr. Lester pressed me to hold that the fact that the tenant was out of occupation when he assigned in *Swanson v. Forton* (5) was the decisive factor, and he rested his argument mainly upon the language used by Lord Greene M.R. and Tucker L.J., in relation to *In re Swanson’s Agreement* (6), in which Evershed J. had reached an opposite conclusion. I am not sure that I have fully appreciated the precise ground of distinction between those cases. But if (as here) the sole purpose of the assignment is to give to the assignee statutory protection which the assignor does not want and does not intend to get for himself, I do not see why the conduct of the landlord

(1) [1949] Ch. 151.

(2) *Ibid.* 152.

(3) [1949] 1 K. B. 85, 96.

(4) [1949] Ch. 153.

(5) [1949] Ch. 143.

(6) 176 L. T. 25.

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ought to be influenced by the consideration whether the tenant is, at the moment of the assignment or of the application for a licence, in occupation of the premises or not. Moreover, if Lord Greene M.R. had considered this to be a decisive factor he could not, I think, have failed to say so, especially in the passage in which he said (1) : " Nothing that I have said must " be taken as applying to a case of what in the argument was " sometimes referred to as ' normal ' assignment. If that " phraseology be adopted, the whole basis of fact in the present " case is that the assignment proposed was an ' abnormal ' " one in that it was an assignment of the tail end of the term " by the lessee not for the purpose of conferring the right to " occupy for the few remaining days of the term, but in order " to enable the assignee to occupy thereafter under the Rent " Restriction Acts. In my opinion, therefore, the appellant's " withholding of consent was not unreasonable."

In my judgment Lord Greene M.R.—and the whole court agreed with him—meant that decision to apply to all cases which were abnormal in the sense indicated by him, and this case certainly belongs to that category. Accordingly the refusal of the landlord was not unreasonable. [As the term had expired no question arose as to relief from forfeiture.]

*Judgment for the plaintiff landlord
on claim and counterclaim.*

Solicitors for plaintiff landlord : *H. H. Wells & Sons.*

Solicitors for the defendants : *Hart-Leverton & Co.*

(1) [1949] Ch. 152.

I. G. R. M.

ROMER
J.

1950

Jan. 26

In re PRICE, DECED.

WASLEY v. PRICE.

[1949. P. 1721]

Will—Construction—Gift of " all my belongings "—Whether freehold house included.

Where a testator in his will provided : " I leave all my belongings " to my daughter I. P. . . . all my belongings to be sold within " 8 eight weeks of my death . . . " and made no provision for residue :

Held, that the gift did not include the testator's freehold house, which passed as on an intestacy.

In re Bradfield [1914] W. N. 423, and *In re Mills' Will Trusts* [1937] W. N. 12; 53 T. L. R. 139, considered.

ADJOURNED SUMMONS.

The summons was taken out by one of the administrators of the will dated August 9, 1946, of a testator who died in 1948. The testator, who was survived by his wife and a daughter who was still an infant at the date of the hearing of the summons, used a printed form, but left blank the spaces provided in the printed parts, with the result that no executors were appointed and letters of administration with the will annexed were granted to the plaintiff and the widow. After the blank portion, the will proceeded (in the spelling of the testator): "I leave all my belongings to my daughter Iris May Price to my wife furniture to do as she like all my belongings to be sold within 8 eight weeks of my death and the money to be invested and to draw interested up to my daughter Iris May Price is 25 years of age then to do as she please. If she die before that age 25 years I leave to my too sisters Annie Mary Dobbins and Margaret Price all my belongings." No provision was made for residue. The testator's estate comprised the following items: bank balance, 550*l.*; funeral benefit 17*l.*; live and dead farming stock, 230*l.*; income tax post-war credits, 32*l.*, and a freehold cottage (the family home) valued at 1,500*l.* The furniture referred to in the will was the property of the wife. The question for decision on the summons was whether the gift of "all my belongings" included the freehold cottage, or whether the testator died intestate in respect of it. The arguments are sufficiently set out in the judgment.

Winterbotham for the plaintiff.

Beswick for the widow.

Lazarus (T. A. C. Burgess with him) for the daughter and sisters.

ROMER J. The question at issue is whether the freehold cottage, which constitutes more than half of the total value in the estate, passes under the gift of "all my belongings," or whether it passes as on intestacy. Mr. Beswick, for the widow, contends that it does not pass under that bequest, which in effect passes the personal estate but nothing else.

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He puts the matter partly as a question of construction to be determined in the light of surrounding circumstances, and partly as a matter of dictionary definition and judicial interpretation. He says that it is unusual to apply the word "belongings" to real estate, and he referred to the definition of "belongings" in the Shorter Oxford English Dictionary, which, for the present purposes, is "goods, effects." He says that, if that be the proper meaning, then, as effects and goods are both confined to personalty, belongings should be similarly so confined.

With regard to the extent to which the word "belongings" has received consideration in the courts, he cited two cases which show that a wider interpretation has been given to the word "belongings" than the definition of "goods, effects," to which I have referred. The first case was *In re Bradfield* (1), in which gifts of specific chattels were followed by gifts of other chattels and "all other belongings," and that gift, in its turn, was followed by other specific bequests. The judgment of Eve J. was very shortly reported, as follows: "Eve J. held that 'belongings' must be given its primary meaning of 'property' and 'all other belongings' covered all that the testatrix did not specifically dispose of." At first sight, that would seem to show that Eve J. gave a fully extended meaning to the word "belongings," but the report does not indicate the property of which the testatrix died possessed. In particular, it does not show whether she died possessed of any real estate; but, inasmuch as the phrase which had to be construed, "all other belongings," followed a gift of personal chattels, it seems to me reasonably clear that no real estate was included amongst the testatrix' assets, because it would have been difficult to hold, having regard to the ejusdem generis rule, that "belongings" in that context should pass real estate. What, in my judgment, was held was that the word must be given its primary meaning of "property" in the sense that "all other belongings"—which was the phrase used—would cover all the testatrix' personal property that she did not dispose of. So I do not derive any assistance from that case beyond the fact that Eve J. held that belongings would include property.

In the next case *In re Mills' Will Trusts* (2), the testatrix, by her will, gave to her daughter "all my home

(1) [1914] W. N. 423. (2) [1937] W. N. 12; 53 T. L. R.

"and personal belongings except the piano and that is "for my grandson All insurance to go to my "daughter." It was held that the words "all my home "and personal belongings" were sufficient to pass the whole of the residuary estate of the testatrix. Bennett J. said that the word "belongings" was wide enough to cover a testatrix' personal estate, and had been held by Eve J. in *In re Bradfield* (1) to have the primary meaning of "property," and that, unless there were sufficient in the will before him (Bennett J.) to afford a context restricting the meaning of the term "belongings," it should be interpreted as meaning "property." That, again, on the facts, is no authority for the proposition that "belongings" would pass real estate. On the other hand, Mr. Lazarus points out, both those cases are authorities for the proposition that "belongings" means property in a wide sense, and that, therefore, in the courts the word "belongings" has received a less narrow interpretation than that which is to be found in the Shorter Oxford English Dictionary. Mr. Lazarus argues from that that, once you go beyond the narrow meaning in the dictionary, you may go the whole way and say that it covers and includes all the property of which a person died possessed.

So much for the arguments relating to the dictionary and legal meaning of the word "belongings" in general, and the cases which have, apparently, some bearing upon it. I will now consider the contentions of Mr. Beswick on the construction of the will, which, he says, shows not only that there is no reason whatever to suppose that the testator was intending to dispose of his house, but that there are cogent reasons to suppose the contrary. The family circumstances were that he was survived by his wife and daughter who was at the date of the will, and is, an infant. Mr. Beswick says that it is apparent that the main purpose of the testator was to benefit his daughter, and that it would be an odd way of benefiting her to deprive her of her home. I do not myself see a great deal of force in that contention, although it certainly has some force; for she would, instead of the house, have the proceeds of sale, and, as everybody knows, the present time is, or, at all events, last year was, a very favourable time for selling property. Apart from that aspect, Mr. Beswick relies very much on the emphatic direction that the testator's belongings, whatever he intended those to be, were to be sold

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within eight weeks of his death. He says that, although such a direction might be perfectly sensible and perfectly capable of being carried out in relation to the farming stock, it would have been quite impossible to carry out in relation to real property, more especially as he did not take the trouble to appoint anybody to be an executor or executors of his will.

Mr. Lazarus argued as I have already indicated on the question of the meaning of the word "belongings." He says, and rightly, that Eve J. and Bennett J. gave a wider meaning to the word than that which is to be found in the Shorter Oxford English Dictionary, and he contends that accordingly one should extend the meaning to real property. He argues : take the word "belongings" and see what it means ; all that it means is something that belongs to a person ; and in common conversation it is certainly apt and modern language to say, "whom does that house belong to?" As to that, it is true that it is quite accurate to say "To whom does that "house belong?" but my own view of the matter is that "belongings" has now a secondary or special meaning of its own in that, while it may mean "property" in ordinary parlance, it cannot be applied to property other than personal property. In that view I am supported by the dictionary definition, and my view is not, I think, in the least at variance with the cases already referred to, because in neither of them was the mind of the judge applied to real estate at all. When they said that "belongings" meant or included property, they meant, having regard to the particular matters which fell for decision, personal property.

Accordingly, I approach this will on the footing that "belongings," in its natural sense according to ordinary common usage, is not an apt expression to relate to real estate. Certainly there is nothing on the face of the will to lead to a contrary conclusion, because it seems to me that the direction for sale within eight weeks shows that the testator was not thinking at all of his house, which was the home not only of his daughter, but of his wife who was living with him. Apart altogether from the administrative difficulties, of getting a legal personal representative appointed and selling the house within eight weeks, this direction would mean, if carried out, that his wife and daughter would have to leave the family home hurriedly and find somewhere else to live, which last year was, and still is, by no means an easy thing to do. As I say, the direction for sale is perfectly apt and intelligible in

regard to the rest of the testator's assets, but it seems to me to be wholly inappropriate to his own cottage, the family home; and it strongly indicates, in my view, that the testator was not contemplating the inclusion of his house in the expression "all my belongings."

I accordingly arrive at the conclusion, partly on the ordinary meaning of the word "belongings" in the English language, and partly on the construction of this particular will in the light of the surrounding circumstances, that "belongings" is to be given the same meaning as it received in *In re Mills* (2), that is to say, the residuary personal estate, and that it does not have a more extended meaning. The argument was, of course, produced or suggested that the court leans against an intestacy; but if the court finds language which it can fairly interpret and which, taking the language as it stands, has one effect and one effect only, it is not entitled and has never been entitled to depart from that meaning simply for the purpose of avoiding intestacy, which, as Romer L.J. pointed out in *In re Edwards* (2), is something which testators may deliberately have in contemplation.

For these reasons, I hold that, on the true construction of the testator's will, the gift in it of "all my belongings" did not comprise the freehold property known as Church View, Bishops Cleeve, but that the testator died intestate in regard to that freehold property.

Order accordingly.

Solicitors for all parties: *Waterhouse & Co., for Winterbotham, Gurney & Co., Cheltenham.*

(1) [1937] W. N. 12; 53 T. L. R. (2) [1906] 1 Ch. 570, 574.
139.

F. R. D.

GOLDBERG v. EDWARDS.

C. A.

1949

Dec. 6, 7.

Landlord and tenant—Lease—Appurtenant rights—Agreement to grant lease from January—Tenants' entry into possession—Personal right to use passage—Lease executed in July—Whether right appurtenant to demised premises "at the time of conveyance"—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 62, sub-s. 2.

Evershed M.R.
Cohen and
Asquith L.JJ.

A house fronting on a street had an annexe at the rear, which was connected with the back of the house by a covered passage-way.

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Access to the annexe was either through the front door of the house, along a passage in the house and through a door into the covered passage-way, or by an outside passage which ran along the east side of the house. The last tenant of the annexe had only used the outside passage. On January 13, 1947, the first defendant agreed to let the annexe to the plaintiffs from January 18, and to allow them a personal right of access to it through the front door of the house. The plaintiffs went into possession of the annexe and thereafter not only themselves used the front door of the house to reach it, but also used that door as a means of access for their servants and customers, and for the delivery of goods. The Vice-Chancellor held that the first defendant's grant of permission for this latter use was limited to that period for which she would be in occupation of the house herself. Such use was accordingly conceded not to be within s. 62, sub-s. 2 of the Law of Property Act, 1925. In pursuance of the agreement of January 18, the landlord by a lease dated July 10, 1947, demised the annexe "with appurtenances" to the plaintiffs for a term beginning on January 18, 1947. The first defendant subsequently granted a lease of the house to the second defendant, who locked the front door and refused to allow the plaintiffs access to the annexe through the house. The plaintiff sought an injunction to restrain the defendants and each of them from obstructing access to the annexe through the house.

Held, (1.) that a right of way through the front door and ground floor of the house to the annexe was not necessary for the reasonable or convenient enjoyment of the annexe, and that a claim based on implied grant of such a right of way, apart from s. 62 of the Law of Property Act, 1925, must fail. *Borman v. Griffith* [1930] 1 Ch. 493, considered; (2.) that the right of the plaintiffs to use the front door of the house as a means of access to the covered passage leading to the annexe was a personal one which they enjoyed qua lessees and which could be included in a lease and so could come within s. 62 of the Act of 1925; and (3.) that the personal right of ingress and egress of the plaintiffs through the front door of the house to and from the annexe was a right appertaining to the demised premises within s. 62, sub-s. 2, of the Law of Property Act, 1925, "at the time of conveyance," and so enforceable by the tenants, since, for the purpose of the case in hand, those words meant July 10, 1947, the date of execution of the lease, when the right in question was being enjoyed in fact, and not January 18, 1947, the date from which the term began and on which the plaintiffs took possession and acquired the right.

Wright v. Macadam [1949] 2 K.B. 744, followed.

APPEAL from the County Palatine Court of Lancaster.

The defendant landlord, Mrs. Margaret Edwards, was the owner of a house at Salford, which formed part of a terrace fronting on to Camp Street, and of an annexe consisting of

two storeys at the rear of the house. Owing to the inclination of the ground, the ground floor of the house corresponded with the first floor of the annexe, which could be approached by an outside passage which ran from the road along the east side of the house and to the rear and then over waste ground to a door in the annexe. The annexe could also be reached through the front door of the house and then along the passage of that house to a door at the rear opening into a covered corridor which joined the annexe. The landlord was herself carrying on business in the house. She had previously let the annexe to a tenant who had approached it by the outside passage-way. The door between the house and the covered corridor to the annexe had been kept bolted by the landlord throughout that tenancy. On the determination of that tenancy, the landlord entered into negotiations with the plaintiffs, Isadore Goldberg and Barnett Sewelson, to let to them the annexe. In the course of those negotiations, as the Vice-Chancellor found, the landlord agreed to give personal privileges to the plaintiffs themselves, including that of going to the annexe through the front door of the house and of using the letter box in that door. On January 13, 1947, an oral agreement for the demise was reached between the parties and the plaintiffs went into possession of the annexe on January 18, 1947. On July 10, 1947, pursuant to that agreement, the landlord granted a lease to the plaintiffs by which she demised the annexe "with the appurtenances" from January 18, 1947, for a term of two years, with an option (which was exercised) to renew for a further term of two years.

After the plaintiffs had gone into possession of the annexe, they started to use the front door to admit customers and for the delivery of goods. The Vice-Chancellor found that that extended use was with the landlord's consent, but that she limited her consent to it to such time as she should herself be in possession of the house. The plaintiffs put a bell on the door of the house which rang into the annexe, and they fixed a board advertising their business on the front of the house.

In January, 1949, the landlord agreed to let the house to the second defendant, Nathan Miller, who, having gone into possession, bolted the door giving access from the house to the covered corridor leading to the annexe and prevented the plaintiffs from having access to it through the front door of the house. In this action the plaintiffs sought an injunction to

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restrain the landlord and the tenant of the house from obstructing or interfering with the entrance of the plaintiffs, their servants and persons duly authorized by them, from the road to the annexe by the front door of the house.

The Vice-Chancellor dismissed the action holding, first, that the only right which the landlord had granted to the plaintiffs was a personal right to use the front door of the house themselves and, secondly, that that privilege was not a right appurtenant to the demised premises on January 18, 1947, when the plaintiffs took possession, that being in his opinion the relevant date at which to determine what rights passed under s. 62, sub-s. 2, of the Law of Property Act, 1925 (1), and not July 10, 1947, the date of the lease. The Vice-Chancellor's findings are more fully stated in the judgment of Evershed M.R.

The plaintiffs appealed.

Pascoe Hayward K.C. and *Maddocks* for the plaintiffs. It is submitted that the Vice-Chancellor was wrong in his decision and that the plaintiffs have an easement to use the door and passage of their neighbours as a right of way. The existence of the easement is contended for (1.) on the ground of implied grant and (2.) as arising under the general words of s. 62 of the Law of Property Act, 1925. In regard

(1) Law of Property Act, 1925, s. 62, sub-s. 1 : "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all out-houses, erections, fixtures, cellars, areas, courts, court-yards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof." Sub-section 2 : "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all out-houses, erections, fixtures, cellars, areas, courts, court-yards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

to the first of these grounds, the plaintiffs' contention is that where two tenements were created by severance, and a way existed by the front door and passage of the one for the convenience of the other, that right of way will pass by implied grant. In order to establish that it must, of course, be shown that the way through the quasi-servient tenement was needed by the quasi-dominant tenement: see as to this Gale on Easements (11th ed.) p. 165.

[EVERSHED, M.R. If the right claimed be said to have arisen for the needs of separate occupation, it must surely be taken into account that after severance the occupier of the one tenement need not go through the main part of the other tenement for business purposes.]

A relevant authority is *Ford v. Metropolitan Railway Co.* (1). It is true that some regard must be given to the terms of the lease in which the grant to the one tenement of such a right as to use the front door and passage of the other might have been expected to be made expressly. But the court must take into account the evidence of the use made of the way, and the only question is whether the court considers the use of the front door and passage reasonably necessary. If no alternative route were possible, the position would be clear beyond question; but, although another route is available, it is three times as long and involves going over waste land in a very bad condition. [Counsel referred to *Wright v. Macadam* (2) and *Borman v. Griffith* (3).]

The plaintiffs contend, secondly, that these rights pass as rights appurtenant to the demised premises by virtue of s. 62, sub-s. 2 of the Law of Property Act, 1925. It is necessary to consider what rights were in fact enjoyed with the demised premises on July 10, 1947, when the lease was granted. The rights then enjoyed are by virtue of s. 62, sub-s. 2 annexed to the premises. The fact that the enjoyment was at that date precarious does not prevent such an annexation: *Wright v. Macadam* (2). Annexation, however, will be prevented if there is evidence that the rights were granted for a limited period only. Applying these principles, it is conceded that the plaintiffs have no right to use the front door for their employees or for the delivery of goods. But they contend that they have a personal right to use the front door, to have their letters delivered there, to maintain a bell on it, and to maintain a signboard on the front of the house.

(1) (1886) 17 Q. B. D. 12.

(2) [1949] 2 K.B. 744.

(3) [1930] 1 Ch. 493.

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Ingress Bell for the defendants, the landlord and the tenant of the house, was not called on to argue on the question of implied grant.

As to the claim under s. 62, sub-s. 2, the right to use the front door which the landlord granted to the plaintiffs was not an easement but a personal licence which could be revoked. In *Wright v. Macadam* (1) the right in question was to use a coal shed. That was not a personal right: it was a right of a different character from that granted to the plaintiffs here, which was merely a personal licence.

"At the date of conveyance" in s. 62, sub-s. 2, means not the date of the lease but the date from which the term runs. That, in this case, is January 18, 1947. At that date this right was not enjoyed with the demised premises. Section 62 does not apply to rights which were not in existence at the date of the contract and are not mentioned in the conveyance. The landlord cannot have intended to give a right of way through her house: all that she intended giving was a merely personal right. It is open to the court, looking at all the circumstances, to say that this was merely a personal licence, although the Vice-Chancellor has treated it as a right which could be annexed to the land.

Pascoe Hayward K.C. in reply. If the right granted to the plaintiffs was a purely personal and revocable licence, it was a right which could have been granted in perpetuity and was capable of being granted as an easement in fee simple. It was therefore a right capable of being annexed to the demised premises. This must have been a licence granted to the plaintiffs as tenants of the demised annexe. Apart from the premises the right was useless. *Wright v. Macadam* (1) is authority for the proposition that such a personal right may be annexed to premises.

EVERSHED M.R. [after referring to the facts]. There is no doubt that the landlord gave a number of privileges to the plaintiffs. These included the privilege of going themselves into their premises via the front door of her house, the privilege of fixing a board or advertisement bearing the plaintiffs' name and business near the front door, fixing an electric bell on the front door ringing in the plaintiffs' premises, the use of the front door and passage for the carrying in of goods, and so on; but the real question has been, on what terms were those

(1) [1949] 2 K.B. 744.

privileges granted? Were all or, if not all, some of them granted merely for a limited time, namely, during the landlord's own occupation of the front premises? Were they intended to be merely personal licences revocable at the landlord's volition? I have left out my category of privileges a right to use for certain purposes the letter-box in the front door, and to that I will return presently. The substance of the judge's finding is clearly this: he found that there was a sharp and substantial distinction between the privilege to the two plaintiffs themselves to go to and from the annexe through the front door, on the one hand, and all the other privileges on the other. [His Lordship quoted from the judge's judgment and continued:] The passage just read seems to me consistent only with the view that in the Vice-Chancellor's opinion the privilege given to the plaintiff tenants was intended to be one which otherwise was capable of annexation to the demised property and therefore capable of being caught by s. 62 of the Law of Property Act, 1925.

I have disposed of that matter first because it seems to me to dispose of the outstanding question of fact. I therefore summarize these matters first: so far as the letter box is concerned, it is unnecessary to pursue the point because Mr. Bell, acting for the two defendants, and acting, if I may be allowed to say so, with proper regard for common sense and neighbourliness, has said that he at any rate concedes that the plaintiffs have the right to go and collect letters from the letter box; but the question how they get to the letter box will depend upon the answer to the latter part of the case. In other words, he is not conceding the right of anybody to come to the letter box from the inside of his house, save to the extent that we hold on the main part of the case that they have a right to use the passage. He further says, and this is a matter which is really outside any actual issue we have to decide, that he would have no objection at all to a notice being put up by the front door indicating that at the back will be found the plaintiffs and their business. I feel that that having been stated, it is proper and fair to the parties, on whose behalf it has been said that it should be recorded.

The claim of the plaintiffs, which I have mentioned, has been based on two grounds: first, implied grant, apart altogether from s. 62 of the Law of Property Act, 1925, and secondly s. 62. In my judgment, the first ground cannot be sustained. Mr. Pascoe Hayward says that the proper formulation of the

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law as to implied grants is stated in Gale on Easements (11th ed.) p. 165, in these terms : " Where two tenements are severed and at the time of severance a formed road exists over one (the quasi-servient) tenement for the apparent use of the other (the quasi-dominant) tenement, such formed road being necessary for the reasonable and convenient enjoyment of the quasi-dominant tenement, a right to use such formed road will, it is submitted, pass by implied grant with the quasi-dominant tenement, even where the only ' apparent sign ' is the state of the road on the quasi-servient tenement itself ; and where the apparent sign of user is a part, not of the tenement retained, but of the tenement conveyed, such as a substantial and permanent doorway or a formed road extending over both tenements, there is ample authority for saying that the doctrine of implied grant applies."

We have not examined all the cases on this matter, but I observe that in *Borman v. Griffith* (1), Maugham J. stated, that the principle should be formulated thus : " Where . . . two properties belonging to a single owner and about to be granted are separated by a common road, or where a plainly visible road exists over the one for the apparent use of the other, and that road is necessary for the reasonable enjoyment of the property, a right to use the road will pass with the quasi-dominant tenement, unless by the terms of the contract that right is excluded." I do not read that for the purpose of suggesting that implied grants are confined to the use of roads ; but the difference between Maugham J.'s statement and that in Gale is that the former uses the phrase " necessary for the reasonable enjoyment," whereas Gale says, " necessary for the reasonable and convenient enjoyment." I assume that the principle in one or both of those passages is correct.

Nevertheless, in my judgment it does not follow that a way through the front door of another's premises and through the ground floor and passages is even *prima facie* necessary for the reasonable or convenient enjoyment of premises behind. It would take strong evidence to show that it was so, for the right to pass through another's premises, particularly when they are business premises, is, I think, a considerable burden upon the quasi-servient tenement in any case. But the evidence is that these premises at the back before the plaintiff's tenancy

were wholly or partly in the occupation of another person who carried on another type of business there, and who apparently enjoyed them both reasonably and conveniently without any necessity for passing through the front part of the premises. I therefore reject the argument based on implied grant, and turn to s. 62.

The various rights here claimed are these: first, a right for the plaintiffs personally to pass through the front door and along the passage of the house. The question of the letter box I have dealt with. Secondly, a right to maintain a signboard and an electric bell; thirdly, as a necessary corollary to that, a right for the plaintiffs' customers to use the front door and passage; and, fourthly, a right to use it for the passage of goods. As regards the signboard and the bell, it is to be observed that there is no indication of that matter in the pleadings or in the form of injunction. I need not pursue it, because the finding of the Vice-Chancellor shows quite clearly, to my mind, that everything except the plaintiffs' right to come and go via this route was expressly limited to such time as the landlord should occupy the house herself. In other words, it was a privilege which she herself allowed so long as she was there, because it did not interfere with her own affairs and business. It was clear that she was not making that privilege any part of the bargain between herself and the tenants of the annexe. It is plain, in my view, that these rights, other than the plaintiffs' personal right of passage, were not within the language of s. 62 so as to be covered by the demise to them.

That leaves only the personal right. As I have indicated, my main difficulty has been in deciding whether that was similarly limited or limited in some other way so as not properly to be capable of being annexed to the subject-matter of the demise. Having regard to his judgment, I think that I am bound to regard the view of the judge as having been that, in contra-distinction to the other rights, it was intended to be something which the plaintiffs should enjoy qua lessees during the term of the demise, though it should not be enjoyed by their servants, workmen or any other persons with their authority. Therefore, I think, to quote Jenkins L.J. in the recent case of *Wright v. Macadam* (1): "It is a right or " easement of a kind which could be readily included in a lease " or conveyance by the insertion of appropriate words in the

(1) [1949] 2 K. B. 744, 752.

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C. A. "parcels." What those would be I will state later, because, in the view which I take, it is necessary to see that the injunction or declaration to which the plaintiffs may be entitled is properly formulated.

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Wright v. Macadam (1) was decided after the Vice-Chancellor gave judgment in this case. That is of some importance, because he considered *Birmingham, Dudley & District Banking Co. v. Ross* (2), and *International Tea Stores Co. v. Hobbs* (3). He was of opinion that *Birmingham, Dudley & District Banking Co. v. Ross* (2) was nearer to the present case than *International Tea Stores Co. v. Hobbs* (3). But I think that it is the language of Farwell J. in the latter case, expressly approved by this court in *Wright v. Macadam* (1), which, on a proper analysis, is the more applicable here. On the hypothesis of fact which I am making, the privilege granted here was not temporary, like, for instance, a temporary right of light when it is obvious that buildings shortly to be erected will obscure it. The present privilege is in some ways indeed not dissimilar to that which in *Wright v. Macadam* (1) was held to be covered by s. 62, namely, a privilege for the tenant to use a shed for storing her coal. I therefore think that, if the right which I have defined was one which was being enjoyed at the time of the conveyance, it is covered by s. 62.

That therefore leaves the final point : what is the "time of conveyance" within the meaning of s. 62, sub-ss. 1 and 2? The arrangement about this use of the passage appears to have been made at various dates, the last of which was January 13, 1947. The plaintiffs went into occupation of the annexe on January 18, 1947. The fitting of the bell and signboard took place after that. Several months passed (why, I know not, and it is quite immaterial) before the lease was executed on July 10, 1947, though the term was expressed to run from January 18. It is plain that before July 10 there was no written instrument whatever. Possession may no doubt have been attributable to an oral agreement of which, having regard to the position, specific performance might have been granted ; but I fail to find any instrument in writing within the meaning of s. 62 before the lease of July 10. It seems to me, therefore, that the phrase "at the time of conveyance" must mean in this case July 10. I am unable to accept the view that one should construe that as meaning at the time when the term

(1) [1949] 2 K. B. 744, 752.

(3) [1903] 2 Ch. 165.

(2) (1888) 38 Ch. D. 295.

granted by the lease is stated to have begun. On July 10, 1947, under the privilege granted, this right of ingress and egress was being enjoyed in fact. As I have held, though it is limited to the lessees themselves and does not extend to other persons, it would be capable of formulation and incorporation as a term of the lease, and it is, in my judgment, covered by s. 62. To that extent, therefore, but to that limited extent only, the plaintiffs are entitled to succeed.

On that point alone I have come to a different conclusion from the Vice-Chancellor, who had not the assistance of *Wright v. Macadam* (1), which may perhaps have given a more general ambit to s. 62 than it had before. I am anxious to guard myself from saying that rights, which were purely personal in the strict sense of that word, would necessarily in every case be covered by s. 62. I base myself on the view that the right here given, though limited to the lessees, was given to them qua lessees; and, as such, it seems to me, it is covered by the principle of *Wright v. Macadam* (1) and by s. 62. The Vice-Chancellor was of the opinion that the right date to consider was January 18. With all respect to him, I have come to a different conclusion: I think that the words "at the "time of conveyance" apply to no other date than July 10. I do not find that result startling or surprising, where a landlord chooses to let his tenant in six months before the grant of a lease and allows him to exercise certain privileges. He can always protect himself, if he wants to, by the terms of the lease. Further, it has to be assumed that the terms of the bargain are intended to be in accordance with the rights or privileges which the tenant is allowed to enjoy in fact. Therefore, I do not feel that there is any difficulty in the way of my construction. On the other hand, there might be considerable difficulty in the way of the opposite view where, as sometimes happens, especially in the case of building agreements, a tenant may be let into possession long before the relevant lease, on the understanding that he does a great deal of work himself.

In my judgment the right of the plaintiffs, and it is the only right which they have established, is a right in themselves alone as lessees, and not in their servants or workmen or persons authorized by them, to pass through the defined passage to and from their works. That right, I think, should be exercised only during reasonable business hours. It is convenient that that should be stated by way of recital, and

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I would prefer, in the circumstances, not to go further into the question of what precise hours were intended to be covered by the privilege. That being the right, there should be a declaration to that effect. I do not believe that there is any necessity for an injunction. It may be added that the tenancy will expire in fact in about thirteen months' time, so that it is all less important than it might otherwise have been; but, if there is an assignment to a limited company, the result would appear to be that nobody could then exercise the right at all. I am hopeful, from the attitude adopted on behalf of the defendants, that there is here no lack of neighbourly spirit, so that matters will not be found difficult in practice. For the reasons and to the extent stated, the plaintiffs are entitled to the right which I have defined.

COHEN L.J. I am of the same opinion. I do not desire to add anything to what has fallen from my Lord on the subject of implied grant; but, as we are differing from the judge on the second ground on which Mr. Hayward based his argument, I will state shortly my reasons for thinking that the order which my Lord has proposed is the correct one. The Vice-Chancellor found as a fact that the two plaintiffs are entitled personally to use the front door and corridor as a means of access to the demised annexe, and that that personal use is not limited to the period of the landlord's personal occupation of the rest of the premises or to any other period.

When using the expression "personal," I do not understand the Vice-Chancellor as meaning that the licence was merely a personal one irrespective of the licensees' character as tenants: it was for the tenants' use in their capacity as tenants, or prospective tenants, of the demised premises. The expression "personal" merely means that the use was limited to personal use, and was not to extend to use by workmen, customers or other persons. This is, I think, clear from the statement of the Vice-Chancellor that, had he thought that the material date in considering the application of s. 62 of the Law of Property Act, 1925, was July 10, he would have treated this personal right as one within the ambit of the section. Indeed, that also appears from this later passage in his judgment: "It may well be that the lease "is defective in not expressly providing for the limited use of "the front door by the plaintiffs personally." The Vice-Chancellor, however, thought that the material date was not

July 10, but January 18, 1947, when the plaintiff tenants entered into possession and began paying rent. On this point I am unable to agree with him. Section 62, sub-s. 2, of the Law of Property Act, 1925, provides: "A conveyance of land, having houses or other buildings thereon shall, be deemed to include and shall by virtue of this Act operate to convey, with the land, all . . . rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

Mr. Bell argued that "at the time of conveyance" means, in the case of a lease, the date from which the term granted by the lease runs. He says that any other view would mean that the prospective tenant who was let into possession could extend the ambit of his grant. I would observe, however, that the landlord need not let him into possession. Moreover, acts done by the tenant against the landlord, or without the consent, express or implied, of the landlord, could hardly, I think, amount to the exercise of a right. Further, the landlord can always protect himself by the terms of the lease. Be that as it may, the suggested construction is not the natural meaning of the language used. The same expression is used in sub-s. 1, where it must, I think, mean the date of the conveyance; and I see no reason for placing an unnatural construction on the language used in sub-s. 2. As I read the Vice-Chancellor's judgment, he would have granted an injunction limited in the way which my Lord has indicated, protecting the limited right mentioned, had he thought that the crucial date was July 10. With this view I agree. Indeed, it seems to me that we should be compelled to this view by the decision of this court in *Wright v. Macadam* (1) to which my Lord has referred. I agree with the order proposed.

ASQUITH L.J. I also agree.

Appeal allowed.

Solicitors: *J. D. Langton and Passmore for Wise and Wise, Manchester; Harrison, Sugden & Co. for Sale, Lingards & Co., Manchester.*

(1) [1949] 2 K. B. 744.

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TRUSTS
[1950] 1 Ch. 267

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WILL

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In re WIGHTWICK'S WILL TRUSTS.

OFFICIAL TRUSTEES OF CHARITABLE FUNDS
v. FIELDING-OULD.

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Feb. 24;
Mar. 2.

[1949. W. 672.]

Will—Construction—Rule against perpetuities—Rule against restraint of alienation—Gift of income to non-charitable society—Legatee unable to alienate—Gift over to charity—No “dies certus” for gift over to take effect—Validity of gifts.

A testatrix bequeathed a sum to trustees upon trust to pay the “dividends arising” from it “half-yearly to the treasurer “for the time being” of a non-charitable anti-vivisection society, “such dividends to be at the disposal of the committee for the “time being for the purposes” of the society, with a gift over of the dividends to a charitable society from and after the time when vivisection should be abolished by law “in the United “Kingdom of Great Britain and Ireland, on the continent of “Europe and elsewhere.” On a summons taken out to have determined the validity of the gifts, :—

Held, (1.) that the first gift failed, as (a) it was a gift of income impressed with a trust to apply it for the furtherance of the objects of the society, and (b) the court could never be satisfied on evidence that the condition on which the payment was to determine had been fulfilled, so that the gift constituted a trust of income for an indefinite period for a non-charitable purpose and was therefore void as tending to a perpetuity because the capital was rendered inalienable. *In re Chardon* [1928] Ch. 464, and *In re Chambers Will Trusts*, post, p. 267, distinguished; and (2.) that the gift over also failed as it was contingent and there was no “dies “certus” on which it could take effect. Observations of Lord Selborne L.C. in *Chamberlayne v. Brockett* (1872) L. R. 8 Ch. 206, 211, applied.

ADJOURNED SUMMONS.

A testatrix, who died in 1888, by her will made in 1882, provided: “I give and bequeath the sum of 2,000*l* . . . unto “[certain trustees] in trust to invest the same in such securities “as they may deem proper and to pay the dividends arising “out of such capital sum half yearly unto the treasurer for “the time being of a society or association called or known “by the name of the ‘International Association for the “‘Total Suppression of Vivisection,’ . . . such dividends “to be at the disposal of the committee for the time being “for the purposes of the said association until the time shall

“ arrive that the practice of vivisection be made penal by law
 “ within the United Kingdom of Great Britain and Ireland,
 “ and shall also be made a punishable offence upon the con-
 “ tinent of Europe and elsewhere. And it is my will
 “ and I hereby direct that from and after the time when the
 “ objects of the said International Association for the Total
 “ Suppression of Vivisection shall have become accomplished
 “ by the absolute and total abolition by law of the practice
 “ of vivisection not only in the United Kingdom of Great
 “ Britain and Ireland, but also on the continent of Europe and
 “ elsewhere, then the trustees for the time being of this my
 “ will shall pay the dividends arising out of the capital sum
 “ before mentioned as they shall accrue unto the treasurer
 “ for the time being of the society called or known by the
 “ name of ‘ the Royal Society for the Prevention of Cruelty
 “ ‘ to Animals ’ to be at the disposal of the committee for the
 “ time being of the said society.” After making other pro-
 visions, the testatrix gave the residue of her estate to one
 Anne Thacker absolutely. The plaintiffs, in whom were
 vested the investments representing the legacy in question
 in reliance on *In re Foveaux* (1), paid the income arising from
 them first to the International Association for the Total
 Suppression of Vivisection and later to the National Anti-
 Vivisection Society, an unincorporated body who were their
 successors. In view of the decision of the House of Lords
 in *National Anti-Vivisection Society v. Inland Revenue Com-
 missioners* (2), which laid down that gifts for the purpose of
 anti-vivisection were not charitable, it became necessary to
 ascertain the validity of both the primary gift and the gift
 over. The Treasury Solicitor was joined as a defendant, as
 all efforts to trace those entitled to the residuary estate had
 failed. The summons was heard with that in *In re Chambers’
 Will Trusts* post, p. 267.

Newsom for the plaintiffs. The plaintiffs can properly
 hold funds applicable to charity only. Since the decision in
*National Anti-Vivisection Society v. Inland Revenue Com-
 missioners* (2), they cannot continue to hold the fund on behalf
 of the first defendant, and they seek the directions of the
 court.

Pascoe Hayward K.C. and *Mendel* for the first defendant,
 representing the National Anti-Vivisection Society, successors

(1) [1895] 2 Ch. 501.

(2) [1948] A. C. 31.

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of the International Association referred to in the will. This being a gift to an unincorporated non-charitable body, it is good unless void as a perpetuity. There is no perpetuity unless there is something in the constitution of the society, or in the terms of the gift, which prevents the recipient from spending the subject-matter of the gift. According to the terms of the will and the rules of the society, the dividends are at the disposal of the committee for any proper purpose. The same test should be applied as was applied in *In re Macaulay's Estate* (1), which related to corpus: the court must look at the constitution of the society to see whether anything operates as a fetter on the disposal of any property which comes into its hands, and here the income can be freely dealt with. *In re Chardon* (2), which concerned an income interest, is indistinguishable from the present case; it was held that, as the income interest vested at the death of the testator, the rule against perpetuities did not apply, and that the gift of income until the happening of a certain event was not void as a perpetuity, as it might be alienated. [*In re Swain* (3) and *In re Clark's Trust* (4) were also referred to.] Here the National Anti-Vivisection Society could come to an arrangement with the Royal Society for the Prevention of Cruelty to Animals, and could demand the corpus of the fund from the plaintiffs at any time.

Ian Campbell for the Royal Society for the Prevention of Cruelty to Animals. Assuming that the gift to the first defendant is void as a perpetuity, *In re Canning's Will Trusts* (5) shows that a gift over dependent on a gift void as a perpetuity is itself void; but if the later gift is not dependent on the earlier gift it does not fail: see also *In re Coleman* (6). Here the gift over is not dependent: it is equivalent to a gift of the corpus of the fund, subject to a prior income interest. If, on the other hand, the first gift is valid, the Royal Society for the Prevention of Cruelty to Animals have a valid interest which vested at the testator's death: *Browne v. Moody* (7). [WYNN-PARRY J. The event upon which you are to take may be so uncertain that no "dies certus" can be predicated.]

Buckley for the Treasury Solicitor, representing persons entitled to residue. The declaration of trust regarding income

(1) [1943] Ch. 435, n.

(2) [1928] Ch. 464.

(3) (1908) 99 L. T. 604.

(4) (1875) 1 Ch. D. 497.

(5) [1936] Ch. 309.

(6) *Ibid.* 528.

(7) [1936] A. C. 635.

is for an indefinite and unlimited period, and tends to a perpetuity. The language of the initial gift and the gift over in fact renders the fund inalienable for an indefinite period, and vitiates the gifts as a whole. The gift over to the Royal Society for the Prevention of Cruelty to Animals is, on its true construction, contingent and not vested; but in any event it is to take effect on an event so uncertain that the court could not ascertain whether or not the event had occurred. *In re Chardon* (1) may be distinguished in that here the income is to be paid "to the Treasurer for the time being," so that the income cannot be assigned: it is merely a gift of income year by year. The income is taken upon trust for the purposes of the society, and cannot be assigned. A trust of income in perpetuity or for an indefinite period for a non-charitable purpose is void as it renders the capital of the fund inalienable: see *Jarman on Wills* (7th ed.), vol. 1, p. 248. The event on which the primary trust is to determine is quite indefinite and uncertain. The words of the will must mean that the practice of vivisection is to cease throughout the world, and the court could never be satisfied as to that on evidence. The two legatees could not combine to demand the corpus of the fund, as they are entitled to income only, and in this *In re Chardon* (1) is distinguishable.

The gift over must fail as contingent: it is to take effect from and after an event which may never occur, see the observations of Lord Selborne L.C., in *Chamberlayne v. Brockett* (2).

In re Chardon (1) is also distinguishable in that no trust was imposed on the first legatee as to the disposal of the income, and the first legatee and the remainderman could between them obtain and dispose of the corpus of the fund. The case has also been the subject of criticism: see *Tudor on Charities* (5th ed.), p. 701.

[Argument then proceeded in *In re Chambers' Will Trusts*, post p. 267.]

Cur. adv. vult.

Mar. 2. WYNN-PARRY J. in a written judgment stated the facts and proceeded: As regards the primary gift, the fact that it is a gift of income for an indefinite period is not of itself an objection, and prima facie it will be good if it does

(1) [1928] Ch. 464.

(2) (1872) 5 R. 8 Ch. 206, 211.

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not infringe the rule against inalienability : *In re Chardon* (1). In that case there was a gift of 200*l.* by a testator to his trustees to invest it and pay the income to a cemetery company during such period as they should continue to maintain and keep two specified graves in good order and condition with flowers and plants thereon as the same should have hitherto been kept by him; and he declared that if the graves should not be kept in such order and condition his trustees should pay and apply the income as provided in the will. Romer J. held that the gift was valid as it did not infringe either the rule against perpetuities or the rule against inalienability. Neither in that case nor in the present case is the rule against perpetuities involved, because in neither does any question arise as to the gift in question vesting within the period allowed by the rule.

In *In re Chardon* (1) Romer J. held that the interest of the cemetery company was not inalienable, on the ground that they could at any time dispose of it if they could find a purchaser. His grounds appear most clearly in this passage towards the end of his judgment (2) : " The cemetery company " and the persons interested in the legacy, subject to the " interest of the cemetery company, could combine tomorrow " and dispose of the whole legacy. The trust does not, " therefore, offend the rule against inalienability. The interest " of the cemetery company is a vested interest ; the interests " of the residuary legatee, it being agreed on all hands that, " subject to the interest of the cemetery company, the legacy " falls into residue, are also vested."

That case has been the subject of criticism in Tudor on Charities : see the appendix to the 5th edition, p. 701. The criticism is based on the presence in the will of certain clauses which are omitted from the report. I will not pause to consider the views expressed. It is sufficient for my purpose that the judge accepted the view, which, he pointed out, was common ground, namely, that, subject to the interest of the cemetery company, the legacy to it fell into residue. Romer J. was able to hold the gift to the cemetery company valid, first, because he found no context in the terms of the gift which would operate to fetter the right of the cemetery company to dispose of the income, and, secondly, because, on the view which he accepted, those interested in residue, into which the legacy would fall on the determination of the interest of the

(1) [1928] Ch. 464.

(2) *Ibid.* 470.

cemetery company, could join with the cemetery company in disposing of the whole legacy.

The first question, therefore, is whether the National Anti-Vivisection Society could dispose of the income which is the subject of the primary gift. This is, to my mind, a question which depends on the language of the gift. The income is to be paid half-yearly to the treasurer for the time being of the society. In contrast, the direction in *In re Chardon* (1) was to pay the income to the cemetery company simpliciter, a direction which would include its assigns. The will in this case further provides that the income is to be at the disposal of the committee for the time being for the purposes of the association. That, to my mind, means that the committee must apply the income received each half-year for a particular purpose, that is, the purposes of the association, with the result that, in my judgment, the association takes the income on a trust, namely to apply it towards the furtherance of its objects.

A trust of income for an indefinite period for a purpose not being charitable is void as a perpetuity or as tending to a perpetuity, because it involves rendering the capital inalienable. Turning to the language of the will, by which a limit is sought to be set upon the period of payment to the association, it appears to me that it can be no overstatement to say that it tends to a perpetuity, because it is hardly possible to imagine that the court could ever be satisfied, on evidence, that the condition on which the payment is to determine had been satisfied. On this short ground the present case is, in my view, distinguishable from *In re Chardon* (1), and the primary gift is void.

It remains to consider the validity of the gift over. The validity of this gift appears to me to turn on whether or not it is contingent. It is quite true that there is no magic in the words which may be used to introduce a gift over; but the fact that they can be reduced to "subject to" is not, in my view, the true test. The test appears to me to be whether or not the gift over is bound to take effect. If one can find a "dies certus"* for the determination of the primary gift, then, generally speaking, the gift over will not be construed as being contingent. The death of a person is a dies certus, for it must be predicated of every person that some day he must die.

(1) [1928] Ch. 464.

* Reporter's note: see *Browne v. Moody* [1936] A. C. 635.

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It is on this basis that such cases as *Maddison v. Chapman* (1) and *In re Shuckburgh's Settlement* (2) were decided. Cases where, on the failure of the primary gift, the property given falls into residue stand on a different footing: in such cases it does not matter that the prior interest may be of possibly unlimited duration: *In re Randell* (3); *In re Blunt's Trusts* (4). If, however, the gift over is not to residue and it is not possible to postulate a dies certus, then, in my judgment, the gift over is contingent, and the circumstance that the object of the gift over is charity makes no difference. In *Chamberlayne v. Brockett* (5), Lord Selborne L.C. said: "On the other hand, "if the gift in trust for charity is itself conditional upon a "future and uncertain event, it is subject, in our judgment, "to the same rules and principles as any other estate depending "for its coming into existence upon a condition precedent. "If the condition is never fulfilled, the estate never arises; "if it is so remote and indefinite as to transgress the limits "of time prescribed by the rules of law against perpetuities, "the gift fails ab initio." I will not repeat what I have already said regarding the language of the condition on which this gift over is to take effect. In my judgment, the gift over is contingent and fails. It follows, therefore, that the investments in question now held by the plaintiffs fall into the residuary estate.

In paying the income, as they have done, to the association and then to the National Anti-Vivisection Society up till now, the plaintiffs have acted throughout bona fide and in accordance with the generally-held view that the primary gift was a good charitable trust: see *In re Foveaux* (6). It will, therefore, be proper to declare under s. 61 of the Trustee Act, 1925, that they acted honestly and reasonably and ought fairly to be excused for any breach of trust which they may have committed and for omitting to obtain the directions of the court in the matter, and that they should be wholly relieved from personal liability.

Solicitors: *The Treasury Solicitor*; *Shield & Son*; *Vizard, Oldham, Crowder and Cash*; *The Treasury Solicitor*.

(1) (1858) 4 K. & J. 709.

(2) [1901] 2 Ch. 794.

(3) (1888) 38 Ch. D. 213.

(4) [1904] 2 Ch. 767.

(5) L. R. 8 Ch. 206, 211.

(6) [1895] 2 Ch. 501.

In re CHAMBERS' WILL TRUSTS.

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OFFICIAL TRUSTEES OF CHARITABLE FUNDS
v. BRITISH UNION FOR THE ABOLITION OF
VIVISECTION.

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Feb. 24 ;
Mar. 2.

[1949. C. 856.]

Will—Construction—Rule against perpetuities—Rule against restraint of alienation—Gift of income to non-charitable society—Legatee able to alienate—Gift over to charity—No “dies certus” for gift over to take effect—Validity of gifts,

A testator by a codicil to his will provided: “I direct my “trustees and executors out of the proceeds of my estate to “purchase 800*l.* two and a half per cent. consols and to pay the “income thereof to the British Union for the Abolition of “Vivisection during such time as the said Union “ shall keep in good state of repair to the satisfaction of “my trustees the grave in St. Andrew’s Churchyard, Ham “and on failure so to do to pay the income thereof to the Religious “Tract Society so long as it shall keep in like manner the said “grave in good repair.” By his will the testator gave his residue in trust for the erection and maintenance of certain almshouses. On a summons taken out to have determined the validity of the gifts. :—

Held, (1.) that the first gift was valid, as the language of the codicil was indistinguishable from that in *In re Chardon* [1928] Ch. 464, and accordingly the gift could be alienated by the beneficiary: *In re Wightwick’s Will Trusts*, ante, p. 260, distinguished; and (2.) that the gift over failed, for the same reasons as applied in *In re Wightwick’s Will Trusts*.

ADJOURNED SUMMONS.

A testator, who died in 1916, by a codicil made in 1914 to his will made in 1912, provided: “I direct my trustees and “executors out of the proceeds of my estate to purchase 800*l.* “2½ per cent. consols and to pay the income thereof to the “British Union for the Abolition of Vivisection during such “time as the said British Union for the Abolition of Vivisection “shall keep in good state of repair to the satisfaction of my “trustees the grave in Saint Andrews Churchyard, Ham, “in the County of Surrey, and on failure so to do to pay the “income thereof to the Religious Tract Society so long as “it shall keep in like manner the said grave in good repair.” By his will the testator gave his residue in trust for the erection . and maintenance of certain almshouses. The British Union for the Abolition of Vivisection had maintained the grave

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in question and had received the income of the fund. The summons was taken out for the same reasons and in the same circumstances as in *In re Wightwick's Will Trusts* (1), and the two summonses were heard together.

Newsom for the plaintiffs.

Mendel for the British Union for the Abolition of Vivisection.

Winterbotham for the United Society for Christian Literature (successor to the Religious Tract Society).

M. J. Albery for the charity interested in residue.

[The following cases were referred to in argument : *Maddison v. Chapman* (2) ; *In re Shuckburgh's Settlement* (3) ; *In re Chardon* (4) ; *In re Blunt's Trusts* (5) ; *In re Randell* (6).]

Cur. adv. vult.

Mar. 2. WYNN-PARRY J., after giving judgment in *In re Wightwick's Will Trusts* (1), continued: As regards the primary gift, counsel for the last defendant, the residuary legatee, was constrained to admit that he could not find such a context in this will, as I have found in the other will, as would enable him to distinguish the language of this will from that used in the will considered in *In re Chardon* (4). He therefore developed no argument on this point, but desired to reserve it, so that if the matter should be taken to a higher court he might be free in that court to challenge the decision in *In re Chardon* (4) if so advised. I therefore hold that the primary gift in the case of this will is valid.

So far as concerns the gift over in the case of this will, it appears to me that the same reasoning applies in this case as I have applied in the earlier case, and I therefore hold that the gift over is invalid.

Declaration accordingly.

Solicitors : *Treasury Solicitor ; Cain, Tompkins & Co., ; Hewitt, Woollacott and Chown ; Field, Roscoe & Co., for Rickerby, Mellersh & Co., Cheltenham.*

(1) Ante, p. 260.

(2) (1858) 4 K. & J. 709.

(3) [1901] 2 Ch. 794.

(4) [1928] Ch. 464.

(5) [1904] 2 Ch. 767.

(6) (1888) 38 Ch. D. 213.

In re MCGREAVY (OTHERWISE MCGREAVEY).
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Jan. 19, 20 :
Feb. 9.

Bankruptcy—Sum due for unpaid rates—Whether good petitioning creditor's debt—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 4, 30, 33.

Evershed M.R.,
 Somervell and
 Jenkins L.JJ.

An unpaid demand for rates is a "debt" within the meaning of s. 4, sub-s. 1, of the Bankruptcy Act, 1914, although it is not enforceable by action at law. A local authority may accordingly petition in bankruptcy in respect of such a demand.

Dicta of Cockburn C.J. in *Ex parte Muirhead* (1876) 2 Ch. D. 22, of Lord Esher M.R. in *Seaman v. Burley* [1896] 2 Q. B. 344, and of Slessor L.J. in *Liverpool Corporation v. Hope* [1938] 1 K. B. 751, explained; *In re North Bucks Furniture Depositories Ltd.* [1939] Ch. 690, approved.

Decision of the Divisional Court, ante, p. 150, affirmed.

APPEAL from the Divisional Court (1).

The debtor, Francis Bernard McGreavey, had carried on in partnership with Frederick Leslie Rundle the business of proprietors of a stadium. The partners were indebted to the respondents, Benfleet Urban District Council, in the sum of 4,489*l.* 6*s.* 11*d.* for unpaid rates due in respect of the stadium. The partners having committed an act of bankruptcy by executing a deed of assignment for the benefit of their creditors to which the council were not parties, the council presented a bankruptcy petition in respect of the sum due to them. On that petition the registrar of Southend county court on September 28, 1949, made a receiving order. The appellant debtor alone appealed, contending that rates did not constitute a good petitioning creditor's debt in law. It appeared from the bankruptcy records that there was no record of a petition based on unpaid rates ever having been presented. The Divisional Court dismissed the appeal, and the debtor now appealed to the Court of Appeal.

Aronson K.C. and *Muir Hunter* for the debtor. The question raised on this appeal is whether unpaid rates constitute a good petitioning creditor's debt. It is submitted that unpaid rates are not a debt within s. 4, sub-s. 1 of the Bankruptcy Act, 1914 (2). They do not constitute a liquidated

(1) Ante, p. 150.

(2) Bankruptcy Act, 1914, s. 4, sub-s. 1: "A creditor shall not be entitled to present a bank-

"ruptcy petition against a debtor

"unless—(a) the debt owing by

"the debtor to the petitioning

"creditor . . . amounts to fifty

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sum as is required by para. (b) of that section as their amount is not known until there has been a determination by the justices. Section 30 of the Act of 1914, which lays down what debts are provable in the bankruptcy, does not purport to extend the meaning of "debt" in the earlier parts of the Act. After a receiving order has been made, the right to distrain for rates ceases and then a right to prove for unpaid rates arises.

There must be a judgment debt to form the basis of a bankruptcy motion. A local authority cannot sue for rates : *Liverpool Corporation v. Hope* (1), and therefore cannot present a bankruptcy petition unless an act of bankruptcy has

"pounds and (b) the debt is a
"liquidated sum, payable either
"immediately or at some certain
"future time"

Section 30, sub-s. 1: "Demands
"in the nature of unliquidated
"damages arising otherwise than
"by reason of a contract, promise,
"or breach of trust shall not be
"provable in bankruptcy."

Sub-section 2: "A person
"having notice of any act of
"bankruptcy available against
"the debtor shall not prove
"under the order for any debt
"or liability contracted by the
"debtor subsequently to the date
"of his so having notice."

Sub-section 3: "Save as afore-
"said, all debts and liabilities,
"present or future, certain or
"contingent, to which the debtor
"is subject at the date of the
"receiving order, or to which he
"may become subject before his
"discharge by reason of any
"obligation incurred before the
"date of the receiving order,
"shall be deemed to be debts
"provable in bankruptcy."

Sub-section 8: "'Liability'
"shall, for the purposes of this
"Act, include (a) any compen-
"sation for work or labour done ;
"(b) any obligation or possibility
"of an obligation to pay money

"or money's worth on the breach
"of any express or implied
"covenant, contract, agreement,
"or undertaking, whether the
"breach does or does not occur,
"or is or is not likely to occur
"or capable of occurring, before
"the discharge of the debtor ;
"(c) generally, any express or
"implied engagement, agreement,
"or undertaking to pay, or capable
"of resulting in the payment
"of, money or money's worth ;
"whether the payment is, as
"respects amount, fixed or unli-
"quidated ; as respects time,
"present or future, certain or
"dependent on any one con-
"tingency or on two or more
"contingencies ; as to mode of
"valuation, capable of being
"ascertained by fixed rules or as
"matter of opinion."

Section 33, sub-s. 1: "In the
"distribution of the property of
"a bankrupt there shall be paid
"in priority to all other debts—
"(a) All parochial or other local
"rates due from the bankrupt
"at the date of the receiving
"order, and having become due
"and payable within twelve
"months next before that
"time"

(1) [1938] 1 K. B. 751.

been committed aliunde. The decision of Crossman J. *In re North Bucks Furniture Depositories Ltd.* (1), where he held that a local authority could present a winding-up petition in respect of rates, is distinguishable. Under s. 222, sub-s. 2 of the Companies Act, 1948, what has to be established when a petition is presented to wind up a company is different from what must be established under the Bankruptcy Act, 1914. In the case of a company it must be shown that they are unable to pay their debts. In bankruptcy the petitioning creditor has to prove that a debt is due to himself. The company legislation is not so similar to the bankruptcy legislation that the position with regard to unpaid rates should be the same in both systems. The rating authority here are attempting to enforce payment of rates in a manner not authorized by the Rating and Valuation Act, 1925. [*Lloyd v. Heathcote* (2) and *In re Hunter* (3) referred to.]

Muir Hunter following. The liability to pay rates does not constitute a debt. [He referred to Stroud's Judicial Dictionary, p. 471, and to *Rawley v. Rawley* per Cockburn C.J. (4).] Unpaid rates have not the characteristics of a debt except that they are a sum of money which a man is liable to pay. If a local authority were sued for a debt, they could not claim to set off a liability for unpaid rates. The word "debt" in s. 4, sub-s. 1, should be construed in accordance with the principles laid down in Maxwell on the Interpretation of Statutes, (9th ed.), ch. V and ch. X.

The Rating Acts impose a liability to pay rates which is enforceable by distress and not otherwise. Income tax is expressly made a debt due to the Crown. There is no such provision with regard to rates. In the Bankruptcy Act, 1914, "debt" sometimes means debts and liabilities, as in ss. 28, 29 and 33. In s. 4, sub-s. 1, it is limited to debts strictly so called and does not include also liabilities provable under s. 30, sub-s. 3.

Christie K.C. and *Caplan* for the respondent urban district council. First, it is submitted that, on a fair construction of the Bankruptcy Act, 1914, a local authority are a creditor within s. 3 and therefore entitled to present a petition in respect of any of their debts which have the qualifications laid down by s. 4. "Debts" in s. 4 must have the same meaning as it has in s. 33. In s. 167 "debt provable in bankruptcy" is

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(1) [1939] Ch. 690.

(3) (1879) 3 L. R. Ir. 465.

(2) (1820) 5 Moore (C. P.) 129.

(4) (1876) 1 Q. B. D. 460, 463.

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defined as including "any debt or liability by this Act made "provable in bankruptcy." The test whether a bankruptcy petition can be presented is not whether the creditor can sue but whether his debt is a provable one. In s. 33 unpaid rates are treated as debts which are due and provable. "Liability" is not apt to cover rates. Although a bankruptcy notice cannot be served in respect of rates, it may be a good petitioning debt: *In re Dunn* (1). Further it is to be observed that it is a fraudulent preference under s. 44 for a debtor to pay his creditors and leave rates unpaid. Cases such as *Ex parte Muirhead* (2) show that there are obligations in respect of which an action will lie but which will not support a bankruptcy petition.

In some cases, for instance that of the holder of a bill of exchange not due, a creditor can present a petition although he cannot sue: *In re Barr* (3), *In re a Debtor* (4).

Aronson K.C. in reply. The case really turns on the meaning of "debt" in s. 4, sub-s. 1. A debt in respect of which a creditor cannot sue is not a debt within the sub-section. The weight of judicial opinion is against treating unpaid rates as a debt: see per Lord Esher M.R. in *Seaman v. Burley* (5), per Slesser L.J., in *Liverpool Corporation v. Hope* (6), and per Cockburn C.J. in *Ex parte Muirhead* (2).

C. W. Chandler for the trustee in bankruptcy.

Cur. adv. vult.

Feb. 9. SOMERVELL L.J. read the judgment of the court.

The issue raised by this appeal is whether rates assessed, demanded and unpaid are a debt, and the rating authority to whom the rates are due are a creditor who can petition within s. 4, sub-s. 1 of the Bankruptcy Act, 1914, the relevant provisions of which are as follows: "A creditor shall not be "entitled to present a bankruptcy petition against a debtor "unless . . . (b) the debt is a liquidated sum, payable "either immediately or at some certain future time . . ."

The rating authority here are Benfleet Urban District Council. Their petition sets out that the debtors, McGreavey and Rundle, who carried on business as partners, were justly and truly indebted to the council for 4,489*l.* 6*s.* 11*d.* for

(1) [1949] Ch. 640.

(2) (1876) 2 Ch. D. 22.

(3) [1896] 1 Q. B. 616.

(4) [1938] 2 All E. R. 530.

(5) [1896] 2 Q. B. 344.

(6) [1938] 1 K. B. 751.

general rates ; and that an act of bankruptcy had been committed—and this is not disputed—within three months by an assignment of their property to a trustee for the benefit of their creditors generally. The council were not a party to and have not assented to that deed. A receiving order was made on this petition by the registrar on September 28, 1949. Rundle did not, but the appellant debtor did, appeal against that order to the Divisional Court. The issue which we have to decide was raised as an additional ground before the Divisional Court, consisting of Harman and Romer JJ., who dismissed the appeal. From that decision the debtor McGreavey appeals to this court. We are told, and we accept, that there is no case of a petition based on rates to be found in the bankruptcy records.

The main argument was based on the fact that unpaid rates cannot be recovered by an ordinary action. It was submitted, therefore, that there was no debt within s. 4, sub-s. 1 (b) of the Bankruptcy Act, 1914. It is common ground that unpaid rates are not recoverable by action, but it is necessary at the outset to refer to the statutes with regard to rates and their recovery. By 43 Elizabeth, c. 2, which first created rates, the overseers, by s. 4, were authorized by warrant from two justices to levy the rates arrears “ of everyone “ that shall refuse to contribute according as they shall be “ assessed ” by distress and sale of the offender’s goods. By the Distress for Rates Act, 1849, s. 2, it is provided that if no or no sufficient goods or chattels can be found on the execution of such a warrant, it shall be lawful for the justices to issue a warrant of commitment ordering the person on whom the rates have been assessed to be imprisoned for a period not exceeding three months, unless the sums therein mentioned shall be sooner paid.

The general law as to the making of rates, appeals, and so on, is now contained in the Rating and Valuation Act, 1925. Section 1, sub-s. 2 of that Act transferred the powers and duties of the overseers of the poor, in relation to the making, levying and collection of rates, to the rating authority.

The Money Payments (Justices Procedure) Act, 1935, s. 10, modified s. 2 of the Act of 1849: if justices are of opinion that the failure to pay the rates was not due either to wilful default or culpable neglect, they are not to issue the warrant. If no warrant is issued, they are given power to remit the payment of part or all of the sums to which the application relates.

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(OTHERWISE
MC-
GREAVEY),

In re.

Ex parte
McGREAVY
v.

BENFLEET
URBAN
DISTRICT
COUNCIL.

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It was decided by this court in *Liverpool Corporation v. Hope* (1) that an action by a local authority to recover unpaid arrears of rates will not lie. Reference will have later to be made to some observations in the judgment in that case, but it clearly decided that unpaid rates are not an actionable debt.

We will now consider the relevant provisions of the Bankruptcy Act, 1914. Mr. Aronson relied on the history of certain provisions, on dicta in various cases, and on the absence of any case in which a liability for rates has been made the basis of a petition. We have borne these matters in mind and will refer to them in detail later, but we prefer in the first place to state what seems to us the natural construction of the provisions of the Act, which we have to construe and apply. Section 4, sub-s. 1 (b) has already been read. There is an express reference to rates in s. 33, sub-s. 1 (a), which reads as follows: "In the distribution of the property of a bankrupt "there shall be paid in priority to all other debts—(a) All "parochial or other local rates due from the bankrupt at the "date of the receiving order, and having become due and "payable within twelve months next before that time, and all "assessed taxes, land tax, property or income tax, assessed "on the bankrupt up to April 5 next before the date of the "receiving order, and not exceeding in the whole one year's "assessment."

The wording of s. 33, sub-s. 1 (a) makes it clear that rates are regarded as becoming "due and payable." When a sum for rates is lawfully demanded, it does, we would have thought, in the ordinary meaning of words become due and payable, although not actionable. The section also makes it clear that rates are provable. If a man has been made bankrupt owing a sum for rates, it is not disputed that a rating authority has a "remedy" by proving for the sum due in the bankruptcy. It is, with assessed taxes, given a priority.

An argument for the council was based on the words "all "other debts." This implies, it was said, that rates are a debt for all the purposes of this Act, including s. 4. This is not, in our opinion, a conclusive argument, by reason of the provisions of s. 30, which sets out what is and what is not provable in bankruptcy.

It is necessary to read s. 30, sub-ss. 1, 2, 3 and 8. It is clear from s. 30, sub-s. 3, that the expression "all other "debts" in s. 33, sub-s. 1 (a) is given a special and extended

meaning, and it would not necessarily follow that the word "debt" in s. 4 had this same extended meaning. Sub-section 8 of s. 30 shows that there are provable debts which would not support a petition, being outside the express provisions of s. 4. On the other hand, reading s. 30 and s. 33 together, we come to the conclusion that rates are within the word "debts" in s. 30 and are not brought in as a "liability" which is deemed to be a debt. In the first place, we think that the word "debt," apart from any indication from the context to the contrary, would in its natural meaning cover a liability for rates. It is undoubtedly a sum due. If a man were asked to make a list of his debts he would clearly include it. In the second place, if the word "debt" is to be construed in its narrow procedural sense as meaning a sum for which an action can be brought, leaving rates to be brought in as a liability, we would have expected an express reference to rates in sub-s. 8 of s. 30, having regard to the express reference to rates in s. 33.

We will now consider the wording of s. 4 and the sections which precede it. Section 1, which sets out what constitutes acts of bankruptcy, provides as follows in sub-para. (f): "If 'he'—that is a debtor—"files in the court a declaration 'of his inability to pay his debts or presents a bankruptcy 'petition against himself.'" It seems to us plain that unpaid rates must be a "debt" to be taken into account when a debtor is considering whether he is in a position to file a declaration within the opening words of this sub-paragraph.

Section 3 reads as follows: "Subject to the conditions 'hereinafter specified, if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being 'presented either by a creditor or by the debtor, make an 'order, in this Act called a receiving order, for the protection 'of the estate.'" When one comes to s. 4, which has already been read, its wording, we think, tends to negative the view that "debt" is used in its pleading or procedural sense. If it were, it would be unnecessary to provide that the debt must be a liquidated sum.

Whether or not "debts" extends in s. 1 to all provable debts, we find no grounds in the Act for construing the word "debt" in s. 4 as referring only to debts in the pleading or procedural sense. Considering the words in s. 4, having regard to the use of the word "debts" in ss. 30, 33 and 1,

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sub-s. 1 (f), we would come to the conclusion that the council are a creditor and the unpaid rates a debt within s. 4.

We think that considerable support for this construction is to be found in the case of *Lloyd, Assignee of Warwick, a bankrupt v. Heathcote* (1). The question there was whether the bankrupt had begun "to keep house with intent to delay "creditors." A collector of rates had called and been told by the bankrupt's wife, on his instruction, that he, the bankrupt, was not at home. It was argued that this was not sufficient, as the bankrupt could not be proceeded against immediately, but only by distress on a justices' warrant. In the course of his judgment Dallas C.J. said: "But it has "been contended that the collector was not a creditor, as he "could not immediately sue the bankrupt for his debt. The "argument, however, rests on fallacy, as it confounds the debt "with the remedy, and assumes that the former cannot exist "unless the debtor may be sued in the usual and ordinary "manner The collector was in the nature of an agent "duly entitled to demand and receive them, and when the "assessment was made, the debt was created, and might be "immediately demanded." Park J., said this (2): "I am "further of opinion, that the collector of the rates in question "was in a situation to apply for them as a debt due at the "time, and concur with the distinction as drawn by my Lord "Chief Justice, as to the debt being due, and the effect the "denial might have, in postponing the remedy of the collector." Burrough J. said (3): "The rate is in the nature of a debt, "and it is immaterial whether it be immediately suable or "not, for if a remedy be given to recover the assessments "due, they must stand in the same situation as debts which "are usually suable."

It is, we think, relevant that at that date, when the old forms of action existed, the word "debt" in relation to bankruptcy proceedings was regarded as apt to describe unpaid rates.

Although in certain contexts the word "debt" means a liquidated sum which can be sued for, to treat the word as *prima facie* so restricted is, we think, to confuse, as Dallas C.J. said, the debt with the remedy. This is well illustrated by the wording of the Infants Relief Act, 1874, s. 2, which was considered in *Rawley v. Rawley* (4), and runs: "No

(1) 5 Moore (C. P.) 129, 137.

(3) Ibid. 140.

(2) Ibid. 139.

(4) 1 Q. B. D. 460.

"action shall be brought . . . upon any promise made after full age to pay any debt contracted during infancy." We were referred to Stroud's Judicial Dictionary, p. 471, where that case is cited as authority for the statement: "A 'debt' is 'a sum payable in respect of a liquidated money demand recoverable by action.'" We have quoted one of the statutes being construed in *Rawley v. Rawley* (1) in which the word "debt" is used to cover what was plainly not recoverable.

Mellish L.J., in considering the Statute of Set-off (2 George II, c. 22, s. 13) on which the case turned, quoted this passage (2) from the judgment of Wilde C.J. in *Francis v. Dodsworth* (3): "The judicial construction of this section has been, that no debts can be used by way of set-off under this statute except such as are recoverable by action; and it has accordingly been held that the Statute of Limitations may be replied to a plea of set-off." The language implies that the word debts covers sums which are not recoverable by action. The statement in Stroud must be read in the context of the decision, which was, in substance, that, if no action can be maintained, a debt cannot be set off.

We will now consider the argument based on the history of this legislation. Mr. Aronson started with the Debtors Act, 1869, but we think it worth referring to the earlier Act, the Bankruptcy Act, 1861. That Act made provision in s. 89 for the amount of the petitioning creditor's debt, in s. 97 provided for how secured debts were to be dealt with, and expressly excluded debts barred by the Statute of Limitations. By s. 6 of the Act of 1869: "Moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity." It had been held that an equitable creditor could not petition: see, for example, *Medlicot's case* (4). We will assume for the moment, without deciding, that "due at law" in this context means recoverable by action. In the Bankruptcy Act, 1883, the words "due at law or in equity" are omitted, and the relevant provisions of s. 6 are identical with those of s. 4 of the Act of 1914. It is suggested that the only reason for the omission was the passing of the Judicature Act, 1873, and that we must therefore read in the words "due at law." It would clearly not be sufficient to read in "due," as the words we have quoted from s. 33 make it clear that the rates are treated as "due." No doubt in certain circumstances previous

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(1) 1 Q. B. D. 460.

(3) (1847) 4 C. B. 202, 220.

(2) *Ibid.* 467.

(4) (1731) 2 Strange 899.

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legislation is of legitimate assistance to construction. There can, however, be no presumption that Parliament has not intended to alter the law when words are changed or omitted. Suppose that when the Bill was under discussion it had been suggested that simply to omit these words might extend the scope of the section in certain directions: Parliament might have thought such an extension desirable. We have ourselves considerable doubt as to the premiss of the argument: once it appears that rates are treated as "due and payable" when assessed and demanded, we should have thought that they were probably within the words "due at law."

It was submitted that Parliament, having set up the procedure under which a defaulting ratepayer might in certain circumstances be imprisoned, and in certain circumstances have a remission of rates, would not allow a rating authority the further or alternative right of petitioning in bankruptcy in respect of the unpaid rates. We do not follow this argument. There seems to us no kind of inconsistency in having one procedure perhaps more appropriate for small sums due from individuals, and another, and in some cases alternative, procedure more suitable for large sums due from individuals or limited companies.

Before coming to the dicta relied on by Mr. Aronson, we would like to make a general observation: an obiter dictum, though not binding, may be of great assistance in coming to a conclusion, if it is clear that its author had in mind the issue which the court has to decide. If not, it is of little, if any, help, and it is very often unfair to its author to seek to extend it to an area which he was clearly not considering. For example, Mr. Aronson, who was, if we may say so, right in drawing our attention to these dicta, referred to the observations by Slessor L.J. in *Liverpool Corporation v. Hope* (1), that the only remedy which is afforded to a local authority entitled to rates is that of distress. We agree with what was said by the Divisional Court, that Slessor L.J., was addressing his mind only to the question before him, namely, whether a remedy by action was available. He clearly had not in mind, and was not considering, the construction of the Bankruptcy Act, 1914, as applicable to rates. Under that Act there is admittedly "a remedy" other than distress, namely, proof in the bankruptcy.

(1) [1938] 1 K. B. 751.

In *Ex parte Muirhead* (1), a co-respondent in a divorce suit was ordered to pay 5,000*l.* into the registry. As he was abroad, the order was altered and the sum was ordered to be paid to the husband, he undertaking to pay it into the registry. It was held that that did not constitute a good petitioning creditor's debt. The ratio decidendi was thus stated by Sir Wilfred Greene M.R. in *In re a Debtor* (2): "The reason why it was held insufficient . . . was that it merely put the petitioner into the position of a conduit pipe for bringing the money to the court, and gave him no rights of his own with regard to it." That decision does not, of course, assist us here. Cockburn C.J. in the course of his judgment in *Ex parte Muirhead* (3) said: "Now, in order to constitute a good petitioning creditor's debt, you must have that which may be the immediate subject of an action at law or suit in equity." The law at that time was contained in s. 6 of the Act of 1869. As a general statement it is inaccurate now, in that a debt payable at a certain future date is a good petitioning creditor's debt. Quite plainly, however, the Lord Chief Justice had not in mind the question whether, on the construction of the Act of 1869 as a whole, rates, which are referred to as due and payable for the purpose of proof in s. 32 of that Act, were "due at law" within s. 6.

In *Seaman v. Burley* (4) this court had to consider the question whether proceedings before justices, under a local Act, for a warrant of distress in respect of unpaid rates with power to commit to prison if there were insufficient distress was a criminal cause or matter. It was argued that the power to imprison was not punishment, but a process for enforcement of a civil liability like an order for commitment under the Debtors Act, 1869. It was in this context that Lord Esher M.R. said (5): "Therefore, assuming the contention that the rate is a debt to be well founded, which I do not admit, nevertheless, if the Legislature have enacted that it may be recovered or enforced by criminal procedure, there can be no appeal to this court. But I do not think it is true to say that the obligation to pay the rate is a debt. It is certainly not a debt in the ordinary sense of the term. No one can bring an action for it. It is a payment to be made in pursuance of a public duty which cannot be enforced by

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(1) 2 Ch. D. 22.

(4) [1896] 2 Q. B. 344.

(2) [1938] 2 All E. R. 530, 533. (5) *Ibid.* 347.

(3) 2 Ch. D. 22, 25.

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“action or in any other way than by proceedings before “magistrates.” That passage shows that a decision of this issue was not necessary for Lord Esher M.R.’s decision on the appeal. The words used show that he had not in mind bankruptcy proceedings, where rates are admittedly provable priority “debts.” With respect, we think that a rate is a debt in the ordinary sense, though it may well not be for the purposes of the argument which Lord Esher M.R. was considering.

We were also referred to a passage in the speech of Viscount Simon L.C. in *Potts v. Hickman* (1). The decision in that case is not relevant, but in the passage cited the Lord Chancellor confirmed the view, which had been previously expressed, that justices, when granting a distress warrant for rates, are proceeding judicially. This, no doubt, is an instance of what is plain, namely, that there is this special procedure for dealing with defaulting ratepayers. It does not in our opinion advance the argument. We were also referred to *In re Hunter* (2). That case turned on special powers given by statute to the Collector General of Rates in the City of Dublin, and we do not think that it assists.

In *In re North Bucks Furniture Depositories Ltd.* (3), the question was whether a rating authority, to which rates were due from a limited company and which had obtained a distress warrant but found no goods and chattels upon which to levy distress, were a creditor within s. 170 of the Companies Act, 1929, and could present a petition to wind up the company. Crossman J. decided that they were. The company did not appear, but Mr. Upjohn, for the petitioners, drew the attention of the judge to *Liverpool Corporation v. Hope* (4). In s. 264 of the Act of 1929 there is a provision similar to that in s. 33, sub-s. 1 (a) of the Bankruptcy Act, 1914, giving rates a preference in the winding up, and referring to them inferentially as debts. Mr. Aronson argued that that case could be distinguished as there was no section in the Act of 1929 corresponding to s. 4 of that of 1914. The Acts are, of course, different, but, as it seems to us, the reasoning of Crossman J. is, *mutatis mutandis*, on the same lines as our reasoning in the present case, and we agree with his conclusion. It is satisfactory that there should be uniformity, and that in both cases a rating authority to whom rates are owed is a

(1) [1941] A. C. 212, 221, 222.

(3) [1939] Ch. 690.

(2) 3 L. R. Ir. 465.

(4) [1938] 1 K. B. 751.

creditor who can present a petition. We have examined, but do not propose to set out, the relevant sections of the Companies Act, 1929. It is sufficient to say that, if the conclusion to which we have come on the Bankruptcy Act, 1914, is right, the decision of Crossman J., on the sections which he had to construe seems to us a fortiori right.

It was suggested in the course of the argument that the conclusion to which we have come is a surprising one. It does not surprise us. Rating authorities, in carrying out their duties, have not sought a decision of the courts as to whether unpaid rates would support a petition in bankruptcy. Since 1861, with the possible exception of the period 1869 to 1883, there was clearly an argument for this contention, having regard to the general meaning of words and the observations in the case of *Lloyd, Assignee of Warwick v. Heathcote* (1). The point not having been raised, it would not have been surprising if one had found that the words used in the relevant Act excluded a rating authority from petitioning. But, considering the code as a whole, it seems to us sensible that the body which is given priority among those who can prove in the bankruptcy should have a right, if so minded, to petition. We agree with the Divisional Court, for substantially the same reasons, and in our opinion this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Percy Haseldine & Co.; Zeffertt, Heard and Morley Lawson for Heard and Coleman, Hadleigh; The Solicitor, Board of Trade.*

(1) 5 Moore (C. P.) 129.

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In re A DEBTOR (No. 564 OF 1949)

1950

Jan. 23.

Evershed M.R.,
Somervell L.J.,
and
Hodson J.

Ex parte COMMISSIONERS OF CUSTOMS AND EXCISE.

v.

THE DEBTOR

Bankruptcy—Infant trader—Purchase tax unpaid—Tax debt due to His Majesty—Unsatisfied judgment—Bankruptcy petition—Whether infant liable to adjudication—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 3—Finance (No. 2) Act, 1940 (3 & 4 Geo. 6, c. 48), s. 31, sub-s. 2.

Where an infant has incurred debts in the strict sense, that is, debts legally enforceable against him as an infant, a receiving order may be made against him under s. 3 of the Bankruptcy Act, 1914, for the status of infancy is irrelevant to the question whether the bankruptcy jurisdiction applies.

It is not against public policy that an infant should be adjudicated bankrupt; nor is there any inconvenience in such an adjudication, for the discretion vested in the court to refuse to make a receiving order prevents the use of the Bankruptcy Act, 1914, in an inappropriate case.

An infant trader failed to pay purchase tax for which she was liable under the Finance (No. 2) Act, 1940. Purchase tax is declared by s. 31, sub-s. 2, of that Act to be recoverable as a debt due to His Majesty, and the Commissioners of Customs and Excise duly recovered judgment against her. The judgment was not satisfied and the Commissioners presented a petition in bankruptcy against her. The registrar held that he had no jurisdiction to make a receiving order.

Held, that the liability to pay purchase tax was, by virtue of s. 31, sub-s. 2, of the Act of 1940, a debt legally enforceable against the debtor though an infant, and that accordingly a receiving order should have been made against her.

In re Smedley (1864) 10 L. T. 432; *Ex parte Stevenson, In re Purser* (1868) 19 L. T. 23; *Ex parte Hands* (1867) 15 W. R. 1089, considered. *Rex v. Newmarket Income Tax Commissioners, Ex parte Huxley* [1916] 1 K. B. 788, applied. *In re Jones* (1881) 18 Ch. D. 109, and *Lovell & Christmas v. Beauchamp* [1894] A. C. 607, explained.

APPEAL from Mr. Registrar Parton.

The debtor, an infant twenty years of age, had been carrying on business in partnership with her mother as a manufacturer of cosmetics. They were duly registered under the Finance (No. 2) Act, 1940, as manufacturers, and were the persons accountable for purchase tax. On August 24, 1949, the Commissioners of Customs and Excise recovered judgment

against the debtor and her mother for unpaid purchase tax. A sum had been paid on account, but 284*l.* remained unpaid. The Commissioners applied for a receiving order against both the debtor and her mother in respect of the unpaid balance of the tax.

The registrar made a receiving order against the mother but refused to make one against the infant debtor on the ground that there was no authority for making such an order against an infant; but he intimated that, if he had had jurisdiction to do so, he would have made an order.

The Commissioners appealed.

Denys Buckley for the Commissioners. The question is whether a bankruptcy order can be made against an infant in respect of unpaid purchase tax, which is made a debt due to the Crown by s. 31, sub-s. 2 of the Finance (No. 2) Act, 1940, which provides: "Tax shall be recoverable as a debt due to His Majesty from the person accountable therefor" The infant debtor was with her mother the "person accountable" to the Crown for the purchase tax. There is nothing in the Act of 1940 which exempts an infant trader from liability for this tax. It is submitted that where an infant owes an enforceable debt he is within s. 3 of the Bankruptcy Act, 1914 (1) and liable to be adjudicated bankrupt. The textbook writers have expressed doubts whether an infant can be adjudicated bankrupt: see Williams on Bankruptcy (16th ed.), p. 41, Chalmers and Hough on the Bankruptcy Acts (9th ed.), p. 22, Halsbury's Laws of England (2nd ed.), vol. II, p. 13. In three reported cases before the Infants Relief Act, 1874, an infant was adjudicated bankrupt: *In re Smedley* (2), *Ex parte Stevenson*; *In re Purser* (3) and *Ex parte Hands* (4). *In re Jones* (5) does not lay down any general proposition that an infant cannot be made bankrupt. [Counsel also referred to *In re Soltykoff* (6), and *In re A. & M.* (7).] There is nothing in the Bankruptcy Act which suggests that its provisions do not apply to an infant.

- (1) Bankruptcy Act, 1914, s. 3: "Subject to the conditions here-
" in after specified, if a debtor
" commits an act of bankruptcy
" the court may, on a bankruptcy
" petition being presented, either
" by a creditor or by the debtor
" make an order, in this Act
- " called a receiving order, for the
" protection of the estate."
(2) (1864) 10 L. T. 432.
(3) (1868) 19 L. T. 23.
(4) (1867) 15 W. R. 1089.
(5) (1881) 18 Ch. D. 109.
(6) [1891] 1 Q. B. 413.
(7) [1926] Ch. 274.

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Wingate-Saul for the respondent debtor. It is submitted, first, that it is a rule of law that an infant cannot be made bankrupt; and, secondly, that, if that is not so, it is a rule of practice that an infant should not be made bankrupt. The passages in the textbooks show that the editors had never come across any case in which an infant was adjudicated bankrupt since the passing of the Infants Relief Act, 1874. In *Lovell & Christmas v. Beauchamp* (1) Lord Herschell L.C. expressed doubt whether an infant could be made bankrupt. That shows that he had never heard of an adjudication order being made against an infant. There are no provisions in the Bankruptcy Rules for an infant's being adjudicated bankrupt. One would have expected to find the matter provided for in the rules if it were contemplated that a receiving order might be made against an infant. Lastly, it is submitted that it is contrary to public policy that an infant should be adjudicated bankrupt. If a receiving order can be made against an infant twenty years of age, it could be made against one only seven years old. At no stage below the age of twenty-one is it possible to draw a line. It is conceded that debts for which an infant is legally liable fall within the definition of the word "debts" in the Bankruptcy Act, 1914. It is, however, submitted that, as an infant has not been adjudicated bankrupt for over eighty-two years, a practice has been established that the court will not make an order of adjudicating an infant bankrupt.

Buckley was not called on to reply.

EVERSHED M.R. In the view of the registrar, however desirable it might be to make this infant a bankrupt, and however slender might be her merits, on the authorities which had been cited to him there was no jurisdiction in the court to apply the bankruptcy law to an infant.

The relevant facts are these: the debtor carried on with her mother the business of wholesale traders or merchants in cosmetics, a class of article subject to the purchase tax imposed by the Finance (No. 2) Act, 1940. Under that Act, a wholesale seller of articles of the kind referred to as "chargeable goods" is liable to be registered, and is also liable, on the sale of goods, save in certain immaterial exceptions, to account to the Crown for purchase tax in respect of them.

The important section for present purposes is s. 31, sub-s. 2

(1) [1894] A. C. 607.

whereby purchase tax—"shall be recoverable as a debt due to His Majesty from the person accountable therefor." The facts show that both the mother and the debtor were duly registered as wholesale dealers in this kind of goods, and they were accountable to the Crown for this tax upon their sales. They appear to have failed to account for the tax which they had collected from the purchasers of goods from them, and the amount of the tax unaccounted for accordingly became, within s. 31, sub-s. 2, recoverable as a debt due to His Majesty from the debtor and her mother. That circumstance is, to my mind, a vital element in this case.

In *Rex v. Newmarket Income Tax Commissioners; Ex parte Huxley* (1) an analogous question arose, namely, whether infancy was a defence to a claim to proceed upon an assessment for income tax under the Income Tax Act, 1842. Huxley, the party in that case, was carrying on business (apparently with considerable profit to himself) as a jockey, but was an infant at the material date. It was said on his behalf that the Income Tax Acts (including the particular section which provides that the amount of the tax is a debt due to the Crown) did not apply to him by reason of his infancy. That contention was rejected by this court. Lord Cozens-Hardy M.R. opened his judgment thus (2): "The question in this appeal is whether 'a jockey under the age of twenty-one, who has made large profits or gains from his business or employment, can be assessed to the income tax. The answer to this question depends upon the construction of a few clauses in the Income Tax Acts which undoubtedly admit of considerable argument. The charging section is s. 100 of the Act of 1842. It makes all 'persons' receiving profits chargeable with income tax under Sch. D, and the contention on the part of the Crown is that the infant is a 'person' receiving the profits, and that there is nothing in the Act to exempt him from liability."

At the end of Warrington L.J.'s judgment occurs this passage relevant also in connexion with another argument which I shall discuss presently: (3) "But it is said that the general scope and purport of the [Income Tax] Act is such that it is a necessary inference that an infant is personally exempt from its requirements. Huxley contends that the Act requires the exercise of skill and intelligence in preparing

(1) [1916] 1 K. B. 788.

(3) Ibid. 803.

(2) Ibid. 797.

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" returns, and of discretion and judgment in deciding whether
 " to appeal, and so forth ; that the law treats all infants,
 " whether babies in arms or men of twenty years of age, as
 " equally incapable, and that accordingly it cannot be supposed
 " that the legislature intended to require from any infant
 " what the smallest baby in arms would be incapable of doing.
 " But I think the legal doctrine of equality of incapacity has
 " reference to the question of status before the law, and for
 " the purpose of construing such an Act as the present it has
 " no applicability. I think it is a sufficient answer to the
 " rest of the argument that an infant who controls and manages
 " his own concern, as Huxley does, may well be treated as
 " capable of doing what is required under the Act." The
 Lord Justice therefore came to the conclusion that the infant
 was liable to be assessed. It seems to me to follow, as a matter
 of authority, from that decision that in this matter of purchase
 tax the sums for which the infant, as a partner with her mother
 in the firm, is accountable constitute debts in the strict sense—
 that is, debts duly recoverable at law. The question, therefore,
 is, assuming the existence of such a debt, whether the fact
 that the debtor is an infant nevertheless produces the result
 that the provisions of the Bankruptcy Act, 1914, by express
 language or necessary inference, do not apply to her ?

So far as express language is concerned, the matter seems
 to me tolerably plain. Section 3 of the Bankruptcy Act,
 1914, provides as follows : " Subject to the conditions herein-
 " after specified, if a debtor commits an act of bankruptcy
 " the court may, on a bankruptcy petition being presented
 " either by a creditor or by the debtor, make an order, in this
 " Act called a receiving order, for the protection of the estate."
 In my judgment, all the conditions indicated in that section
 are satisfied. There is here a debtor, the infant, who became
 indebted to His Majesty, in the strict sense of that phrase, for
 purchase tax. An act of bankruptcy has been committed,
 in that the Crown has obtained judgment for the amount due
 and owing. In accordance with the Act, notice was served
 upon the debtor to pay the sum due and she failed to do so.
 Beyond question, if there is here a debt, there is a creditor,
 and the sum in question is not below the limit set in the section
 or otherwise disqualified by any of the terms of s. 4. Therefore,
prima facie, on the plain language of this section and of the
 Act generally, there seems to me to be proved jurisdiction
 in the court to make a receiving order.

It is, however, said that there is authority in the text-books and in judgments which indicates that, where the debtor is an infant, the bankruptcy jurisdiction is inapplicable. So far as the text-books are concerned, it is true to say that there appears to be unanimity, at any rate, in doubting whether the bankruptcy jurisdiction even applies to infants. In one of the text-books referred to, Chalmers and Hough on the Bankruptcy Acts (9th ed.), p. 22, the matter is stated quite categorically: "A petition does not lie against a corporation nor against an infant." Certain cases are cited in support of that proposition, but they are the same cases which are cited in support of the statements in other books to which I shall refer presently. There is nothing in the notes or authorities cited in Chalmers and Hough which seems to justify any stronger view than that expressed in Williams on Bankruptcy and in Halsbury's Laws of England.

In Williams on Bankruptcy (16th ed.), p. 41, the opinion is expressed with less assurance thus: "It is doubtful whether an infant under any circumstances can be made a bankrupt. In *In re A. and M.* (1), a Divisional Court annulled an adjudication of two infants consequent on their own petition, none of the debts being legally enforceable against them. The court will always enquire into the consideration of the judgment which must be a claim which, having regard to the provisions of the Infants Relief Act, 1874, and to the general law of infancy, is enforceable against the infant. Infancy has never been a defence in tort and a judgment in tort constitutes a debt. An infant, too, in equity, has always been held liable for fraud." It will be observed that what follows after the first sentence seems to be limited to showing that, where there are not debts enforceable against an infant, there can be no basis for the exercise of the bankruptcy jurisdiction, and I think that that must undoubtedly be so.

The question here is whether if there is, as there was not in the instances given, a legally enforceable debt, the same result follows? The editors of the 2nd ed. of Halsbury's Laws of England, who are deserving of the greatest respect, namely, the late Luxmoore L.J. and the late Mr. George Kingham, suggest that there is a negative answer to that question. It is stated (2nd ed.), vol. II, at p. 13: "It appears that an infant cannot be made bankrupt, nor can he alter

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“ his legal status as an infant by himself presenting a bankruptcy petition. Though he can make a valid contract “ in respect of necessities supplied to him, it has not been “ decided whether a debt incurred in respect of such contract “ renders him liable to bankruptcy ; but it is submitted that “ it does not, on the ground that this is a matter of status.” The question is whether that sentence is correct, and on what authority the submission is founded.

As a matter of history, it seems clear that, before the passing of the Infants Relief Act, 1874, infants could, in certain circumstances, be made bankrupt ; at least they have been made bankrupt in fact, for three instances were cited to us in which an infant on his own petition was made bankrupt. They were all cases in which the infant was suffering a term of imprisonment for non-payment of a debt. In order to disembarass himself of that debt, and I dare say others, he presented his own petition. The cases are *In re Smedley* (1), *Ex parte Stevenson*, *In re Purser* (2), and *Ex parte Hands* (3).

The basis of *In re Smedley* (1) appears to be this : by the Bankruptcy Act, 1861, the bankruptcy jurisdiction was no longer exclusively applicable to traders. It was conceded that an infant, properly speaking, could not incur a trading debt, but it was said that if an infant incurred a debt of some other kind (in this case on a judgment for a tort) there was nothing which prevented the court's saying that the bankruptcy legislation applied to him. It is important to bear in mind that all three cases were before the courts at a time when the Infants' Relief Act, 1874, had not been passed. At that time the position of an infant—see Anson's Law of Contract (19th ed.) p. 121—broadly speaking, was that contracts made by him were voidable. As the learned author points out, those voidable contracts were of two kinds : contracts which were valid and binding until disaffirmed, as could be done “ either “ during infancy or within a reasonable time after majority ” ; or they were not binding “ until ratified within a reasonable “ time after majority.” But the point to be emphasized for present purposes is that the obligations were not wholly void but voidable. Without pursuing the matter further, in so far as the infant in the two cases which followed *Smedley's* case (1) was in gaol for the non-payment of debt, there appears ground for supposing that the debt had not been effectively

(1) 10 L. T. 432.

(2) 19 L. T. 23.

(3) 15 W. R. 1089.

disaffirmed. Therefore, there was a debt existing, and, that being so, the bankruptcy jurisdiction was applied.

Then came the Infants' Relief Act, 1874, which made debts contracted in the course of trade, and debts contracted otherwise than for necessities, not voidable but void. It therefore followed that, unless the obligations related to the supply of necessities, there could be no debt of any kind whatever arising out of contract; and, there being no debt, it would seem also to follow on general principles that the bankruptcy jurisdiction could not be made to apply. It was on that principle, I think, that *In re Jones* (1) was decided by the Court of Appeal in 1881. There William Jones, an infant, was carrying on a business of trading in coal, coke and breeze. Having incurred obligations in respect of those business transactions, he had been made a bankrupt. His adjudication having been affirmed by the Chief Judge in bankruptcy, Bacon C.J., he appealed to the Court of Appeal, which concluded that there was there no justification for such a decree. Jessel M.R., said (2): "Only debts could then be proved. But there is "no decision which says that this kind of liability is a legal "debt. I use the words 'legal debt' advisedly; of course, "there can be no other debt than a legal debt, but the inaccurate phrase 'equitable debt' has crept into the books. "But this liability is not really a debt at all, it is only a liability "in equity to pay a sum of money, and whenever a debt is "required by law in order to found any proceedings, this "equitable liability will not be enough." Then he says (3): "There is therefore no pretence for saying in the present case "that the infant is a debtor, or that any action could be "maintained against him by the respondents."

To make that passage clear, it should be stated that Bacon C.J. had followed *Ex parte Lynch* (4). The substance of that decision was this: if an infant in the course of trading represented that he was an adult, and (I think that the matter went so far, by his conduct in trading he was taken to hold out that he was an adult) there arose what Jessel M.R. referred to in the former passage as an "equitable debt" for which the infant became liable notwithstanding his infancy. But the Court of Appeal came to the conclusion that the decision in *Ex parte Lynch* (4) was wrong, and disapproved of the ruling

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(1) 18 Ch. D. 109.

(2) Ibid. 120.

(3) Ibid. 121.

(4) (1876) 2 Ch. D. 227.

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of the Chief Judge. Jessel M.R. further said (1): "The "court"—that was the court entertaining a bankruptcy application—"can only be put in motion under" the Act of 1869, "by a person who is a creditor and who has a right "to intervene in the proceedings." But in the circumstances of that case there was no creditor. Baggallay L.J., in the last sentence of his judgment said (2): "We come back "therefore to this, that no debt has been proved to have been "due to the petitioning creditors at the time when the application for the adjudication was made, and therefore the "adjudication cannot be supported."

I have referred at some length to *In re Jones* (3) because the first sentence in the passage quoted from Halsbury, "It "appears that an infant cannot be made bankrupt," etc., is supported by a reference to it. The author, after referring to *In re Jones* (3) goes on to say, "Under the "old law infants have been held liable to bankruptcy and "have been made bankrupt," referring to *Smedley's* case (4) where the "debt" arose out of a tort. But I think it very probable that, had the Infants' Relief Act, 1874, been passed when the two later cases *In re Purser* (5) and *Ex parte Hands* (6) came up for decision, the results would have been different. The editors, therefore, may well be justified in supposing that, as a result of the Act of 1874, which made the obligations which Jones had contracted void altogether, a change had been made in the position. But there is nothing in *In re Jones* (3) which says that if an infant owes a legally enforceable debt the bankruptcy law cannot apply to him. Indeed, the passages read from the judgments of Jessel M.R. and Baggallay L.J. show, I should have thought, that the converse would have been the case; in other words, that it was the absence of a legally enforceable debt that was the basis of the decision.

To revert again to the statement in Halsbury (2nd ed.) vol. II, p. 13, it will be recollected that it is first said that there is no decision in the books showing that a debt incurred in respect of a contract for necessities renders an infant liable to bankruptcy proceedings. I think that that is accurate. The researches of counsel have revealed no such case. The text in Halsbury goes on: "It is submitted that it does "not, on the ground that this is a matter of status." The

(1) 18 Ch. D. 109, 122.

(2) Ibid. 124.

(3) Ibid. 109.

(4) 10 L. T. 432.

(5) 19 L. T. 23.

(6) 15 W. R. 1089.

authority for that proposition is said to be *Lovell & Christmas v. Beauchamp* (1) in the House of Lords, where it had been sought to make bankrupt a firm of which one of the members was an infant. The Court of Appeal (2) decided that the whole of the proceedings and the receiving order made were invalid. It was said to be impossible to have bankruptcy proceedings against an infant partner in respect of trade debts which had been incurred by the firm, because, as in *In re Jones* (3), they were not enforceable debts at all; and, therefore, the whole proceeding and the receiving order made against the firm were regarded as of no validity. The House of Lords varied that by ordering that the receiving order made should not be against the firm simply, but against the firm other than the infant partner.

We have examined closely the opinions of the noble Lords in that case, and reference has also been made to the decision of the Court of Appeal. In my judgment, there is no warrant in any of the opinions of the noble Lords or in the judgments of the Court of Appeal for the view that the bankruptcy legislation is inapplicable to infants by reason of the status of infancy as such. In my judgment, that legislation does not apply to an infant if, and only if, the debts which are invoked in support of it are not enforceable debts at all, but are "debts" or obligations which are in truth wholly unenforceable and void.

Lord Herschell L.C., in the course of his opinion, seems to me at least to indicate the possibility that an infant might be adjudicated, for he said (4): "It is also clear that, even if there are circumstances under which an infant may be adjudicated bankrupt, or a receiving order may lawfully be obtained as a step towards such adjudication, he cannot be made subject to the bankruptcy laws in respect of any debt contracted by the firm of which he is a partner."

It may be, as Mr. Wingate Saul urged, that the language of Lord Herschell L.C. shows that in his mind at that time the possibility of an infant's being made bankrupt was very remote; but it was quite unnecessary for the decision in that case to determine whether in any circumstances an infant could be made bankrupt. The possibility of a petition founded upon legally recoverable debts (for example, income tax or debts for goods supplied as necessities—purchase tax could not then have been considered because it did not exist) was not

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(1) [1894] A. C. 607.

(3) 18 Ch. D. 109.

(2) [1894] 1 Q. B. 1.

(4) [1894] A. C. 607, 611.

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mentioned and formed no part of the debate before the House of Lords. Therefore in my judgment *In re Jones* (1) does not support the view, for which the authors contend in Halsbury, that bankruptcy legislation is inapplicable to infants because of their so-called status. Indeed, the status of infancy as such appears, on examination of the provisions, and indeed the purpose, of the Bankruptcy Act, to be quite irrelevant. If a person—and, *prima facie*, an infant is a person—has incurred debts which are enforceable, it may be to the advantage not only of the creditors but also of the person himself that there should be a proper administration of the estate. It is not to be forgotten that the receiving order is described in s. 3 of the Bankruptcy Act, 1914, as “an order for the protection of the “estate.”

Mr. Wingate Saul's next point is that, while he must admit that there is here an enforceable debt, and while he must admit that on the terms of the Bankruptcy Act, 1914, there is no apparent reason why a receiving order should not be made, still it is against public policy that infants should be made bankrupt. He says, with truth, that there is no certain line which can be drawn, no particular age above which it is reasonable to suppose that an infant may be made bankrupt, but below which it would have to be considered unreasonable. It cannot be supposed, he says, that the legislature intended that a boy or girl of eight years of age should be brought under the bankruptcy legislation. I see no difficulty in that. Although bankruptcy legislation is not confined to trading operations, or to the results of trading operations, the common case no doubt is where a person has incurred debts by way of trade and has been unable to pay them. A boy or girl of seven or eight years will not engage in trade. If a person is of age to engage in trade, then there seems to me to be no ground of public policy why the obligations which fall on the rest of humanity engaging in trade should not also fall on him. There is, after all, a discretion in the court: it is not bound to make a receiving order. If in respect of income tax, for example, it were suggested that a very young child should be made bankrupt—though I find it difficult to imagine such a case—the discretion of the court would amply protect the infant and prevent any use of the Act in circumstances which everybody would agree to be inappropriate.

Mr. Wingate Saul also drew attention to the circumstance that there is in the Bankruptcy Rules, 1915, themselves nothing to cover the case where the infant would have to be represented, for example, by his next friend or his guardian ad litem. It is true that there may be in that regard a lacuna in the Rules of 1915. If there is, it can easily be filled. Reference, however, to the Practice Direction, 1931, seems to show that those responsible for the administration of bankruptcy procedure had not been unmindful of the need to make provision for the case where an infant is interested in bankruptcy proceedings, as clearly he may be, whether or not he is liable to be made bankrupt. I therefore reject the arguments based on public policy, inconvenience, or the absence of precedent.

It seems to me that s. 3 of the Act of 1914 is in terms apt to cover every case where the necessary conditions of a creditor, an enforceable debt, etc., are satisfied. There is nothing, to my mind, in the Act itself which requires or permits the inference that the Bankruptcy Act, 1914, is not intended to apply to infants.

I have discussed this matter fully because of the statements in the text-books ; but it seems to me, for the reasons stated, that the assertion in Chalmers and Hough on the Bankruptcy Acts is ill-founded ; and the same may be said of the opening statement in Halsbury. I think that the doubts expressed in Williams on Bankruptcy may now be taken to be resolved, though in a way contrary to that intimated in the text.

Where such views have been expressed by persons of experience, it is necessary to consider the matter very carefully before making any pronouncement which may be thought to disturb long-established practice. But it must not be forgotten that, at any rate before 1874, there were instances of infants being made bankrupt. The circumstances in which the application of bankruptcy legislation to infants is possible at all are relatively rare, and one would not expect to find a great number of instances. But for myself I am clearly of opinion, having examined the authorities and considered the Act, that there is nothing which makes it inapplicable to the case of an infant provided always that the conditions prescribed in the Act are fulfilled. Therefore I have formed a different view from that entertained by the registrar. Since there is every reason why a receiving order should be made I think that one ought to be made against the debtor as it has already been made against her mother.

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SOMERVELL L.J. I agree that the words of the Bankruptcy Act 1914, given their ordinary meaning, confer on the registrar a jurisdiction to make the order sought in this case against the debtor. I also agree, for the reasons which have been given, that there is nothing in any decided case, nor any general principle of law, which would lead the court to give them any other than their ordinary meaning.

I only wish to refer to a matter which may now really be academic, namely, the principle which seems to me to have been applied in *In re Smedley* (1). That decision, though the argument is not set out, seems to me quite unaffected by the passage of the Infants' Relief Act, 1874. It is to be noted that there the petitioner was in prison under execution for damages and costs arising in an action of tort. Under the common law an infant of over seven years, broadly speaking, was and is liable for torts, and the Act of 1874 is concerned solely with liability for contracts. It is to be noted that the county court judge in *Smedley's* case (1) used these words of the position of an infant as a trader: "Moreover, why was it that the courts held that an infant could not be made bankrupt?—because he could not be a trader. Trading, however, "is no longer necessary." He was referring to the time when bankruptcy procedure only applied to insolvency which arose from the result of trading. It is plain that when the judge said that infants could not trade, he meant that any trading contracts to which the infant was a party were unenforceable against him. Therefore, as it seems to me, the decision in that case must have depended on the fact that the obligations in respect of which the petitioner was in prison, were and presumably the basis of his petition for adjudication was, not a void or voidable liability, but one in tort for which, at any rate *prima facie*, the infant would be answerable. If that is right, then the judgment in *In re Smedley* (1) is exactly in accordance with the principles which have been laid down to-day by the Master of the Rolls.

As to the two cases which followed *In re Smedley* (1), the reports are so short that it is difficult to discover exactly the facts on which the court proceeded. It may be that there was something in them which would have been affected by the passage of the Infants' Relief Act, 1874.

I agree that the appeal should be allowed.

HODSON J. It is not surprising that the registrar should have been impressed with the weight of the authority of the statement in Halsbury's Laws of England (2nd ed.) vol. II, p. 13, which is against the contention of the appellant commissioners; but I do not think that that statement is supported by the decided cases.

I would add a few words to what Somervell L.J. has said about the old authorities. The three cases, *In re Smedley* (1), *In re Purser* (2), and *Ex parte Hands* (3), are all precedents of proceedings by infants in bankruptcy.

It is quite true that they all occurred before 1874, the year of the passing of the Infants' Relief Act. But that Act, as my Lord has pointed out, had only to do with infants' contracts, contracts other than contracts for necessities. Nothing in any of the judgments given since the passing of the Infants' Relief Act, 1874, seems to me to throw any doubt on the soundness of the reasoning of *In re Smedley* (1) which was followed in the other two cases. *In re Smedley* (1) concerned an infant's liability in respect to a judgment in tort. *In re Purser* (2) concerned an infant's liability in respect of trading where his contract would be voidable. In *Ex parte Hands* (3) it is not clear whether the liability was for necessities or not.

I would refer to one case not referred to by my Lords though referred to in argument, namely, *In re A. and M.* (4), a decision of Astbury and P. O. Lawrence JJ. Astbury J. stated the position very clearly, although his judgment was very short, and I think that it is thus accurately summarized in the headnote: "In the absence of debts actually enforceable against them infants cannot be made bankrupt, even on their own petition." In his judgment he used these words which justify that statement (5): "There is no question as to any necessities having been supplied to them"—that is to the infants—"or that there were any other enforceable debts." It seems to me quite clear that the judge had in view cases where there might be, as in the case now before the court, enforceable debts payable by infants. Therefore, not only is the law clear, in my judgment, on the subject, but it is supported by ancient precedents, the validity of which

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(1) 10 L. T. 432.

(4) [1926] Ch. 274.

(2) 19 L. T. 23.

(5) Ibid. 275.

(3) 15 W. R. 1089.

C. A. is not affected by the passing of the Infants' Relief Act, 1874.
1950 I agree that this appeal should be allowed.

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Appeal allowed.

Solicitors: *The Solicitor for Customs and Excise; Franks, Charlesly and Leighton.*

B. A. B.

Considered. *In re.*
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[1949 W. 1685]

Feb. 8.

Evershed M.R.,
Somervell and
Jenkins L.JJ.

Settlement—Protected life interest—Forfeiture if income charged in favour of any other person—Receiver appointed under Lunacy Act, 1890—Percentage fee charged on income and paid by receiver thereout—Whether charge incurring forfeiture—Lunacy Act, 1890 (53 Vict. c. 5), s. 148, sub-s. 3—Management of Patients' Estates Rules, 1934, r. 148—Law Reform (Miscellaneous Provisions) Act, 1949 (12 & 13 Geo. 6, c. 100), s. 8.

The trustees of a settlement dated December 18, 1918, held certain investments upon trust to pay the income to the plaintiff during her life without power of anticipation: "Provided "nevertheless that if . . . any act or event shall happen "whereby the income of the trust fund would if belonging "absolutely to her becomes vested in or charged in favour of or "payable to some other person or persons or a corporation then "and in any such event the trust hereinbefore contained of such "income in favour of the said [plaintiff] shall cease as if she were "dead." After her death, or on the failure of her life interest, the trustees were directed to hold the trust fund in trust for the defendant. By an order dated October 11, 1935, made under the Lunacy Act, 1890, the Official Solicitor was appointed to be receiver of the plaintiff's estate, and accordingly, under s. 148, sub-s. 1, of the Lunacy Act, 1890, a percentage and fees became payable out of the lunatic's estate.

Held, that the payment of the fees levied under s. 148 of the Act of 1890 out of the plaintiff's income did not constitute such a charge as was contemplated by the forfeiture clause, and that accordingly no event had happened whereby the plaintiff's income would, if belonging absolutely to her, have become charged in favour of some other person.

Observations of Farwell J. in *In re Greenwood* [1901] 1 Ch. 887, considered and applied. *In re Tancred's Settlement* [1903] 1 Ch. 715, considered.

In re Custance's Settlements [1946] Ch. 42, overruled.

Quære, whether the fees payable under s. 148 of the Lunacy Act, 1890, are by sub-s. 3, and the Management of Patients' Estates Rules, 1934, r. 148, made a charge on the estate of a lunatic.

Quære, whether the court is entitled to take into account s. 8 of the Law Reform (Miscellaneous Provisions) Act, 1949 (which shows that Parliament then considered that s. 148 of the Act of 1890 imposed a charge on the estate of a lunatic) in construing s. 148.

Decision of Danckwerts J., reversed.

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APPEAL from Danckwerts J.

By a settlement dated December 18, 1918, made between the defendant, Jessie Primrose Vera Westby, of the one part, and trustees of the other part, the trustees therein named were directed to stand possessed of several sums of stock which had been transferred to them upon trust to pay the income to the plaintiff, Lilian Westby, during her life. The settlement then continued : " Provided nevertheless that " if whilst the said Lilian Westby shall be discovert any act " or event shall happen whereby the income of the trust fund " would if belonging absolutely to her become vested in or " charged in favour of or payable to some other person or " persons or a corporation then and in any such event the " trust hereinbefore contained of such income in favour of the " said Lilian Westby shall cease as if she were dead " And it is hereby declared that upon the death of the said " Lilian Westby or the failure in her lifetime of the trust " hereinbefore declared in her favour the said trustees or " trustee shall stand possessed of the trust fund and the income " thereof in trust " for the defendant, Jessie Primrose Josephine Vera Westby. By an order dated October 11, 1935, made under the Lunacy Act, 1890, the Official Solicitor was appointed to be receiver of the estate of Lilian Westby.

By this summons Lilian Westby, acting by the Official Solicitor, sought a declaration that, in the events which had happened, in particular the order of October 11, 1935, whereby the Official Solicitor was appointed receiver of her estate, no event had happened whereby the income of the trust fund would, if belonging absolutely to the plaintiff, have become charged in favour of some other person.

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The rules governing the payment of fees levied in respect of a patient under s. 148 of the Lunacy Act, 1890 (1) are now contained in the Management of Patients' Estates Rules, 1934, part 19, rr. 148 to 160. Those rules contain no reference to any "charge" being imposed on the patient's estate. Under the rules a percentage fee is payable in respect of "the clear annual income of a patient," the percentage in the present case being 3 per cent. a year.

The Chief Clerk of the Court of Protection, in an affidavit filed on the plaintiff's behalf, stated: "The percentage fees charged in connexion with estates dealt with under 53 Vict. c. 5 and Amending Acts are payable either by impressed judicature stamps or out of funds in court pursuant to the Management of Patients' Estates Rules, 1934 (rr. 153 to 156), and, so far as they are directed by the Master in Lunacy to be so paid out of funds in court, are directed by r. 67 (2) (c) of the Supreme Court Funds Rules, 1927, to be carried over by the Accountant-General to an account in the Pay Office books entitled 'Percentage Account under 53 Vict. c. 5 and Amending Acts.' By r. 67 (3) it is provided that the sums lodged placed or carried over to the accounts respectively named in the rule shall be from time to time transferred to the Paymaster General's cash account for the credit of the vote for the Supreme Court of Judicature or otherwise as the Treasury may direct. To the best of my knowledge, information and belief, no direction has in fact been given by the Treasury. In the civil estimates for each financial year is included an estimate of the costs of the Supreme Court of Judicature for that year. In this estimate is included an estimate of the costs of the Court of Protection. There are

(1) The Lunacy Act, 1890, s. 148, sub-s. 1: "The Lord Chancellor, with the concurrence of the Treasury, may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid."

Sub-section 2: "Save as otherwise provided by the Rules in Lunacy the percentage and fees in lunacy shall be subject

"to the rules contained in s. 26 of the Supreme Court of Judicature Act, 1875." [Now replaced by s. 213 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the Administration of Justice Act, 1928.]

Sub-section 3: "The percentage, or a proper proportionate part thereof (as the case may require), shall be charged upon the estate of a lunatic, and be payable thereout"

“ made also in connexion with the estimated costs of the
 “ Supreme Court of Judicature certain appropriations in aid,
 “ that is to say, sums expected to be paid in respect of various
 “ branches of the Supreme Court of Judicature which will go
 “ in reduction of the estimate of the general costs. Among
 “ the appropriations in aid is included an item ‘ Percentage
 “ under Lunacy Act, 1890 (53 and 54 Vict. c. 5) and Amending
 “ Acts in cash payable out of funds in court.’

“ The costs of the Supreme Court of Judicature are estimated
 “ and granted by Parliament, and any excess at the end of the
 “ financial year is surrendered to the Exchequer. Income of
 “ which lunacy percentage forms a part is applied to meet the
 “ cost up to the income limit forecast and approved by
 “ Parliament. Any excess of income over the figure approved
 “ by Parliament is surrendered to the Exchequer. No
 “ individual person is entitled to the benefit of lunacy per-
 “ centage. So far as the estimates are concerned, everyone
 “ who contributes to inland revenue in any year profits to
 “ the extent of the percentage collected in that year, which
 “ helps in a small way to reduce the amount of national income
 “ that has to be raised by taxation.”

In the case of the plaintiff the annual income of the settled funds was received by the trustees of the settlement, who paid it to the Official Solicitor. It appeared from evidence filed by the Official Solicitor that demand forms for payment of the Supreme Court percentage due in respect of a lunatic's estate are issued by the Court of Protection annually and are paid by way of judicature fee stamps impressed on the demand forms. The fees thus demanded in respect of the plaintiff's estate were paid by the Official Solicitor out of moneys of the plaintiff in his hands.

Danckwerts J., held, on November 24, 1949, following the decision of Cohen J., in *In re Custance's Settlements* (1), that the interest of the plaintiff had been forfeited.

The plaintiff appealed.

W. F. Waite for the plaintiff. While it is admitted that s. 148, sub-s. 3, of the Lunacy Act, 1890, states that the percentage payable under the section “ shall be charged upon the “ estate of a lunatic”, it is submitted that in fact the sub-section does not impose a charge as there is no person or corporation entitled to the benefit of such a charge or who can enforce it.

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The only persons who benefit from the percentage are the general taxpayers, as the sums received go in reduction of the expenses of the Supreme Court of Judicature. It is submitted that Cohen J. was wrong in holding in *In re Custance's Settlements* (1) that s. 148, sub-s. 3 imposed a charge. The Law Reform (Miscellaneous Provisions) Act, 1949 (2), which came into operation on December 16, 1949, by s. 8, provides that such percentage shall not operate to create a forfeiture. That section, however, has no application to this case since it does not operate retrospectively. Nor can that section be regarded in construing s. 148, sub-s. 3 of the Act of 1890. It is submitted that the word "charge" is not used in s. 148, sub-s. 3 as meaning an encumbrance, as no person can enforce it. Even if the word "charge" is used as meaning an encumbrance, it is an encumbrance on the income after it comes to the hands of the receiver, and accordingly the charge does not result in a forfeiture: see per Eve J. in *In re Marshall* (3). The percentage fees are, in effect, outgoings payable in respect of the plaintiff's estate.

A. F. M. Berkeley for the defendant. The question is whether s. 148, sub-s. 3 imposes a charge. It is submitted that it does. There is a distinction between the case where a percentage is payable and that where it is charged. Here the percentage is expressly charged on a lunatic's property. The chargees are the Commissioners of Inland Revenue, who can enforce the charge on behalf of the Crown. The fact that no rules have been made as to the manner in which the charge created by the section can be enforced does not alter the nature of the charge created by the Act. It appears from s. 8 of the Law Reform (Miscellaneous Provisions) Act, 1949, that when that Act was passed Parliament had no doubt but that s. 148 did create a charge. The interpretation placed by Parliament on s. 148 is relevant in construing that section.

(1) [1946] Ch. 42.

(2) The Law Reform (Miscellaneous Provisions) Act, 1949, s. 8: "The following proviso shall be inserted at the end of sub-s. 3 of s. 148 of the Lunacy Act, 1890 (which provides that the percentage payable in proceedings relating to a patient and his estate shall be charged upon his estate and be payable

"thereout), that is to say:—
" 'Provided that neither the
" 'charge created by this sub-
" 'section nor any payment made
" 'by virtue thereof shall cause
" 'any interest of the patient in
" 'any property to fail or deter-
" 'mine or to be prevented from
" 'recommencing'."

(3) [1920] 1 Ch. 284.

D. A. Ziegler for the trustees.

Waite in reply. Assuming that s. 148, sub-s. 3 does create a charge, it is not of the kind contemplated by this forfeiture clause. The court will not construe gifts on forfeiture so as to extend the fair meaning of the words used : see per Farwell J. in *In re Greenwood* (1). The charge is one which is primarily for the benefit of the plaintiff herself : see *In re Marshall* (2). The charge only attaches at the end of the year when the spendable income of the plaintiff is known. Her receiver is her statutory agent, and he pays the fees on her behalf. These proceedings were begun before the Law Reform (Miscellaneous Provisions) Act, 1949, was passed, and accordingly s. 8 of that Act has no application to this case and the section cannot be looked at for the purpose of construing s. 148, sub-s. 3. All that s. 8 does, in effect, is to remedy the injustice of the decision in *In re Custance's Settlements* (3).

EVERSHED M.R. This is in form an appeal from a judgment of Danckwerts J., dated November 24, 1949; but it is in substance an appeal against a decision of Cohen J., in *In re Custance's Settlements* (3). The point which arose there and which arises here may be briefly put thus : under a settlement the tenant for life was entitled to the income of the trust property subject to a forfeiture clause, in substantially common form, to the effect that her interest would be forfeited in the event, among other things, of the income to which she was entitled becoming charged in favour of some other person or persons. In this case, as in *In re Custance's Settlements* (3), the tenant for life unhappily had an order made under the Lunacy Act, 1890, appointing a receiver of her property. In both this case and *Custance's* case (3) the point is whether the fees which become leviable—to use for the moment a neutral word—and are ascertained as a percentage of the patient's income are by reason of the language of s. 148, sub-s. 3, of that Act “charged” on the income to which the life tenant, the patient, is entitled so as to create a forfeiture within such a forfeiture clause as that in question.

[His Lordship read s. 148 and continued :] The rules which affect the ascertainment and payment of fees of this kind are now contained in part 19 of the Management of Patients' Estates Rules, 1934, beginning with r. 148. Rules 148 to 160

(1) [1901] 1 Ch. 887.

(3) [1946] Ch. 42.

(2) [1920] 1 Ch. 284.

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are the relevant rules. I need not read them: suffice it to say that they contain no reference to a "charge" or to any kind of encumbrance. That of itself is not perhaps of great importance: plainly, if a charge were created by the Act, it could not be taken away by the rules. It is to be noted, however, that the rules proceed apparently in oblivion of the circumstance that the section imposed a charge. They provide that the percentage is calculated on what is called the "clear annual income." They provide that from time to time the Master in Lunacy shall certify the amount which has to be paid and who is to pay it. In the ordinary course it would be paid by the receiver, who would pay it out of such funds as the Master directed. The clear annual income of a patient upon which the percentage is calculated is a sum arrived at as the result of some elaborate calculations. The method of calculation is to be found set out in Heywood & Massey's *Lunacy Practice* (6th ed.) pp. 132, 133. It is plain that the fees payable in any particular year cannot be discovered until the end of the year when the clear annual income of the patient for that year is known. It is to be noted that such obligations as supertax and other obligations to which the patient may be liable, like bank charges, are matters which have to be taken into account before the clear annual income is ascertained.

Mr. Waite, for the plaintiff, has put forward two arguments: first, he says that when the method of assessing and of collecting these fees is appreciated, it cannot be said, on any proper sense of the term "charge", that fees were "charged" on any income or other property of the plaintiff. Secondly, he says that, even if the court can treat these fees as "charged" upon the estate or income of the plaintiff, the charge is one for a purpose and of a character foreign to the scope and intention of the forfeiture clause and therefore cannot properly be treated as within its ambit so as to work a forfeiture at all.

Both those points were put in *Custance's* case (1) and rejected by Cohen J. In fact, they were put in the reverse order, and, as regards the second (whether, strictly speaking, these fees were a charge at all) the judge, as appears from his judgment, himself in the course of the argument put this point: if they are a charge, who is the chargee? That was, I think, a somewhat formidable question. But counsel concerned to argue against the forfeiture in that case appears to have conceded (and I quote from the judgment) (2) "that he

(1) [1946] Ch. 42.

(2) *Ibid.* 48.

"thought the government officer entitled to receive the money must be either a person or a corporation within the meaning of the clauses under consideration."

It seems to me that on the facts now ascertained there is at least a strong argument for saying, as Mr. Waite has said, that it is impossible to define or identify any officer entitled to receive this money. Who is the chargee? Who would be entitled, as chargees would be normally entitled to do, to ask the Court in Chancery to enforce the charge? Mr. Waite says that there is no such person and therefore that, since the essential characteristic of any charge, namely, the presence of a chargee, is absent, there is no charge at all. He further observes with some justice that the language of s. 148 is capable of sensible interpretation without reading "charged upon" as importing the existence of an encumbrance. In other words, he asks the court to say that the words "shall be charged upon the estate of the lunatic" mean really "shall be assessed upon" just as income tax is said to be "charged"—not upon, but in respect of, certain profits or gains.

It seems to me that there is in the circumstances great force in that argument. But another event has occurred which may have an important bearing on this part of the case, namely, the coming into operation on December 16, 1949, of the Law Reform (Miscellaneous Provisions) Act, 1949. Section 8 of that Act is as follows: ". . . . The following proviso shall be inserted at the end of sub-s. 3 of s. 148 of the Lunacy Act, 1890,"—then comes this significant parenthesis—" (which provides that the percentage payable in proceedings relating to a patient and his estate shall be charged upon his estate and be payable thereout), that is to say, 'Provided that neither the charge created by this sub-section nor any payment made by virtue thereof shall cause any interest of the patient in any property to fail or determine or to be prevented from recommencing.'"

That Act had not been passed when these proceedings started, nor indeed when Danckwerts J. gave his judgment. According to well-recognized principles, in the absence—and I do not think that it is suggested that there is here the presence—of any language indicating retroactive effect, it would not be proper in the determination of this case to apply the proviso in s. 8. We must decide this case according to the law as it was before this Act was passed. Does it follow, however, that in construing s. 148 of the Act of 1890 we are not entitled

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to look at any parliamentary affirmation of any view of construction, even though the affirmation is contained in a statute passed since the proceedings began? That also, I think, is a point of some substance, for the language of s. 8 appears to emphasize that s. 148 in the view of Parliament did create, and was intended to create, a charge.

I have come to the conclusion that it is unnecessary to express a decision on either of these points. I do not decide, therefore, whether there was or was not in this case a charge of some kind on the plaintiff's estate or her income, and I do not decide whether we can take note of the language of Parliament in 1949 in construing the language of the legislators of 1890.

In my judgment the answer to this case is to be found in the second of Mr. Waite's arguments: assuming that a charge of a kind understood by lawyers, something in the nature of an encumbrance upon the income, was created, it is not such an encumbrance as is contemplated by the forfeiture clause in this case, and it does not, and did not, work a forfeiture.

In approaching the question whether there has been a forfeiture, I refer to the judgment of Farwell J. in *In re Greenwood* (1). There a creditor had served garnishee proceedings upon the trustee of a life tenant. The suggestion was made that the effect was to work a forfeiture. The judge pointed out that those who preferred that claim were in a difficulty: if the money which the creditor sought to attack had not become absolutely due and payable to the life tenant, then the garnishee proceedings were wholly ineffective. On the other hand, if the moneys had become absolutely due and payable to the life tenant, then it would appear that no question of forfeiture could arise within the language of the forfeiture clause. By way of expansion of the last point the judge said (2): "In my opinion, the true meaning of these words . . . 'or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof,' is 'if he were deprived of the right to receive the same or any part thereof on the day it becomes due.'" That gloss is justified by the view which he had earlier expressed in these terms: "First of all, we must bear in mind that the courts do not construe gifts on forfeitures so as to extend their limits beyond the fair

(1) [1901] 1 Ch. 887.

(2) Ibid. 891.

“ meaning of the words unless they are actually driven to it.
 “ Forfeitures are not regarded with favour, and there can be
 “ no particular desire to extend the terms of a forfeiture clause
 “ to a gift such as the present.”

With that guide to my application of s. 148 of the Act of 1890 to the present case, I ask myself what is in truth the nature of this charge which I am assuming exists. What is its purpose, and is it such a charge as the forfeiture clause here can be taken fairly to have contemplated? Nobody has contended that the act or event of the appointment of the Official Solicitor as receiver has resulted in the income being payable to some other person or persons within the meaning of the clause. Of course, in a very strict sense it might be said that it had, for the trustees, instead of paying the income when they receive it into the plaintiff's hands, have in fact sent it to the Official Solicitor, who, as receiver, gives them a receipt for it. But Eve J. stated in *In re Marshall* (1), that the Official Solicitor is really a statutory agent for the plaintiff who, unfortunately, is not capable of managing her own affairs.

So much is accepted. But there remains the “ charge.” In *In re Custance's Settlements* (2) Mr. Cross based his argument (accepting as he did that a charge of some sort was created) on an analogy with *In re Tancred's Settlement* (3), where there was a life tenancy determinable on events similar to those relevant here. The life tenant made a marriage settlement and assigned over his life interest to the marriage settlement trustees, but upon terms that he should continue to receive it, subject, however, to this, that the trustees were entitled to pay out of the income, before the balance was handed over to him, their management expenses. It was suggested that that involved a “ disposition ” by the tenant for life which worked a forfeiture ; but Buckley J., said (4) that that was not so. He said that the forfeiture clause “ is intended to “ provide that, if a tenant for life disposes or attempts to dispose “ of his interest so as to lose the enjoyment of it himself, or if he “ should become bankrupt, his life estate should cease and “ be given over to others. This has not happened. Seymer “ Mitford Tancred remained after the settlement the only “ person entitled to the income. The mere fact that the “ trustees may be entitled to have their expenses recouped to

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(3) [1903] 1 Ch. 715.

(2) [1946] Ch. 42.

(4) *Ibid.* 724.

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" them out of the income does not make it a disposition within
 " the clause. It is parallel to the case of a person who is going
 " abroad and appoints somebody to collect his rents on the
 " terms that he should be paid by deducting a commission.
 " Neither is the appointment of the trustees to be his attorneys
 " to recover the income an assignment. He only appointed
 " them to act as his agents"

It is fair to observe that the question on which that case turned was the question whether the tenant for life had himself disposed or purported to dispose of the income so as to effect a forfeiture, a somewhat different problem, strictly speaking, from the present ; but the analogy is not far to seek.

Mr. Cross suggested in *In re Custance Settlements* (1) that the fees payable under s. 148 were really in *pari materia* with remuneration to an agent. Cohen J., who appears to have felt doubt on the whole of the case, eventually came to the conclusion that he could not accept the argument. He said (2) :
 " Had the charge been for the remuneration of the receiver
 " the argument might have been well-founded, but I think
 " I should be straining the law too far if I were to hold that
 " fees payable to the percentage account and applicable as
 " part of the vote for the Supreme Court of Judicature were
 " analogous to remuneration to an agent appointed by act
 " of party or by statute."

With very great respect to the judge, I part company from him in not treating the percentage as fairly analogous. It seems to me that to concede that some kind of a charge to provide for remuneration for the trustee does not work a forfeiture is to proceed upon the view that really what the forfeiture clause is directed to protect is the net income which the tenant for life can enjoy when the necessary and proper expenses of collecting it have been discharged. There may in many cases be expenses of that kind which have to be discharged. It may be that as a result of proceedings trustees are directed to pay certain costs out of income. True, they do not in normal circumstances become the subject of a charge, but the result is, of course, that the income, or a part of it, has to go in discharging some obligation before there is rendered available the sum of income which beneficially the tenant for life may enjoy.

In the present case the charge for fees is not paid as remuneration to the Official Solicitor. He is an officer of the court

(1) [1946] Ch. 42.

(2) *Ibid.*, 48.

whose remuneration does not depend upon the amount of income from the various persons whose affairs he looks after. Certain administration expenses are incurred as a result of the plaintiff's having become a lunatic and of the powers and duties of the Court of Protection having been invoked. The purpose of these fees is to discharge to some extent the general costs and expenses of the administration of the Supreme Court of Judicature. Those costs are levied by way of charge upon the estates of patients who come within the ambit of the Act of 1890. To say that is a charge such as the forfeiture clause contemplated I venture to think offends against good sense. I think that there is a true analogy between the sort of charge envisaged by Cohen J., and designed to provide for the prior payment of management expenses or management remuneration, and this charge designed for securing the contribution which patients have to make to court costs as a result of resorting to the Court of Protection.

I have felt impelled to conclude, notwithstanding the contrary view of Cohen J., that in this case there is no forfeiture, and that in *In re Custance Settlements* (1) was not correctly decided. The result is that in my judgment the plaintiff is entitled to the declaration which she seeks, namely, that, on the true construction of this settlement, and in the events which have happened, in particular an order made on October 11, 1935, under the Lunacy Act, 1890, and amending Acts, no act or event has happened whereby the income on the trust fund would, if belonging absolutely to the plaintiff, become vested in or charged in favour of or payable to some other person or persons.

SOMERVELL L.J. I agree with the Master of the Rolls that it is unnecessary to decide in this case the question whether s. 148 imposed a charge in all or any circumstances. I also agree that the appeal succeeds on the second point, for the reasons given by the Master of the Rolls, to which I do not wish to add anything.

JENKINS L.J. I also agree.

Appeal allowed.

Solicitor : *The Official Solicitor ; Collyer-Bristow & Co.*

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*Landlord and tenant—War damage—Value payment—"Short tenancy"
—Term exceeding seven years by virtue of more than one instrument—
War Damage Act, 1943 (6 & 7 Geo. 6, c. 21), ss. 12, 33, 123.*

[By s. 12, sub-s. 2 (b), of the War Damage Act, 1943, a value payment under the Act "shall be apportioned between the several "proprietary interests subsisting in the" damaged property at the material time. By s. 123 a proprietary interest is defined as including "any tenancy . . . other than a short tenancy." A short tenancy is defined as being, among other things, "a "tenancy granted for a term of seven years or less"]

The tenant of war-damaged property may have a proprietary interest entitling him to share in a value payment under the Act though the term exceeding seven years for which he holds the property at the material time is derived from more than one instrument, each granting a term of seven years or less.

Where, therefore, when war damage occurred in 1940, the tenant of premises held them under a lease granting a term of seven years from June 24, 1936, which lease was expressed to be supplemental to a previous lease granting a term of five years from April 8, 1931, made repeated reference to the previous lease, and, in particular, incorporated its covenants by reference,

Held, that the tenant, at the material date, held the premises for a term, unexpired, of twelve years, and that he was accordingly entitled to participate in the value payment.

Lawrence v. Sinclair [1949] 2 K. B. 77 (decided under s. 4 of the Landlord and Tenant Act, 1927), applied.

ADJOURNED SUMMONS.

The sum of 1,018*l.* 7*s.* 10*d.* was paid into court under s. 33 of the War Damage Act, 1943, (1) and stood to the credit of

(1) War Damage Act, 1943, s. 12, sub-s. 2 (b): a value payment "shall be apportioned "between the several proprietary "interests subsisting in the here- "ditament . . . at the material "time which were depreciated "in value by reason of the war "damage . . . and a right to "receive the share of the pay- "ment apportioned to each of "those proprietary interests . . . "shall vest in the person who "was at the material time "the owner of that proprietary "interest"

Section 33, sub-s. 1: "If the "right to receive a sum repre- "senting a payment . . . in "respect of war damage, or a "part of such payment, is "claimed by two or more persons "adversely to each other . . . "the Commission . . . may "make payment thereof to the "proper officer of the Supreme "Court"

Section 123: a proprietary interest means "(a) the fee simple "in the land comprised therein "or any part of that land; and "(b) any tenancy of that land

an account entitled "In the matter of the War Damage Act, 1943, and in the matter of the hereditaments known as 38, 39 and 40, Windmill Street, St. Pancras, in the County of London." It represented part of a value payment made by the War Damage Commission, and was claimed by the applicants, Alfred Richard Graham Bull and Arthur Henry Foyster, and by the respondent, Harold William Hensman. On November 15, 1940, the property had suffered war damage and become a total loss within the meaning of the War Damage Act. The applicants were at all material times the owners. The respondent, when the damage occurred, was in possession under a document dated December 3, 1935, and executed as to one part by the applicants as lessors and as to the other part by the respondent as lessee. It was endorsed: "Deed extending the term of lease of Nos. 38, 39 and 40, Windmill Street for seven years from June 24, 1936, at 230*l.* per annum rent." The deed recited: "This deed is made the third day of December One thousand nine hundred and thirty-five between Alfred Richard Graham Bull and Arthur Henry Foyster (hereinafter called 'the lessors' which expression shall where the context so admits include the person or persons from time to time entitled in reversion immediately expectant on the term hereby granted) of the one part and Harold William Hensman of 38, 39 and 40, Windmill Street, Saint Pancras (hereinafter called 'the lessee' which expression where the context so admits shall include his executors administrators and assigns) of the other part. Whereas: 1. This deed is supplemental to a lease (hereinafter called 'the lease') of April 8, 1931 and made between the lessors of the one part and William Hensman [the father of the respondent

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"or of any part thereof, other than a short tenancy;" and a short tenancy means "a tenancy granted for a term of seven years or less (without any right of renewal which would enable the tenant to prolong the term thereof beyond seven years), and includes—(a) a tenancy granted for a term of more than seven years but subject to a subsisting right of the landlord to determine

"the tenancy at or before the expiration of seven years from the beginning of the term; (b) a tenancy from year to year; (c) a tenancy at will; (d) a tenancy granted for a term limited to expire, or subject to a right of the landlord to determine the tenancy, on, or at a time or within a period expiring not later than seven years after" a number specified occasions.

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"tenant] of the other part whereby the lessors demised unto
"the said William Hensman for a term of five years" 38, 39
and 40, Windmill Street "at the yearly rent of 220*l.*
"2. The interest of the said William Hensman in the said
"lease is now vested in the lessee. 3. The lessors have agreed
"with the lessee to demise to him the premises comprised in
"and demised by the lease for a further term of seven years
"to commence on June 24, 1936, at the rent of 230*l.*
"payable at the like times and in like manner as the rent
"reserved by the lease and subject to the like covenants and
"agreements on the part of the lessee"

The respondent tenant further covenanted that he would observe and perform the covenants and be subject to the proviso for re-entry "in like manner as if all such covenants "and conditions as to re-entry had been repeated in the "deed with such modifications as the circumstances might "require." There was also a provision entitling the tenant to purchase the reversion at a specified sum on giving notice before the expiration of the term.

William Hensman, the father of the respondent tenant, died in 1934. The tenant was his executor and the specific legatee of his interest under the lease of 1931.

The question for determination on this summons was whether the tenant was entitled to the sum of 1,018*l.* 7*s.* 10*d.* in court as owner of a "proprietary interest" in the property within the meaning of s. 123 of the War Damage Act, 1943; in other words, whether he was in possession under a tenancy "other than a short tenancy" within the meaning of that section.

D. H. McMullen for the landlords. The question really turns on whether or not the tenant's interest was a "short tenancy" within the meaning of s. 123 of the War Damage Act, 1943. The deed of 1935 operated as a grant of a reversionary lease. If the two tenancies were added together it is obvious that this would not be a short tenancy. But the deed of 1935 is a fresh lease, entirely independent of the first lease. Before 1925 the tenant would have had an *interesse termini* as distinct from another tenancy: *Lewis v. Baker* (1). *Interesse termini* was abolished by s. 149 of the Law of Property Act, 1925. The true construction of the deed of 1935 is that it was the grant of a reversionary

lease and that was the interest possessed by the tenant during the currency of the first lease, notwithstanding the Law of Property Act: *Terroni and Necchi v. Corsini* (1). Two tenancies which are primarily distinct cannot be joined together. [Counsel referred to Foa on Landlord and Tenant (7th ed.), pp. 16, 17.] The deed of 1935 was the grant of an entirely new tenancy.

G. Brian Parker for the tenant. The draftsman of the second lease showed that it was intended to be supplemental to the first. The operative part of the second lease is in the ordinary terms, but it constantly refers back to the original lease. Covenants in the first lease ceased to have effect when the second lease began and were replaced by the specific provisions of the second deed.

Under s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, the question of the duration of a tenancy also arises, and the Court of Appeal held in *Lawrence v. Sinclair* (2) that a tenancy can consist of one or more tenancies. Similarly under the War Damage Act a tenancy can be one which comes from two different sources. On that definition it does not matter that it was a grant of a reversionary lease.

McMullen replied.

VAISEY J. stated the facts and continued: The issue here is whether the deed of 1935 ought to be treated as a new and fresh lease to the tenant, without any regard to the earlier history of the matter, or whether it ought to be regarded merely as an extension of the existing term which was due to expire on June 24, 1936, so as to expire seven years' later than that date. The deed may be quite accurately described, so far as its effect goes, in either of those two ways. It is a strange thing that at this time a question, which turns out to be of serious importance, should have arisen as to which of those two alternative ways of looking at a document should be adopted, the effect of which is perfectly plain.

[His Lordship read s. 12, sub-s. 1, and referred to the definition of "proprietary interest" in s. 123 of the War Damage Act, 1943, and continued:] The question here is whether the interest of the tenant was a tenancy other than "a short tenancy," or whether it was "a short tenancy." In the former case the tenant is entitled to a "proprietary interest" and is entitled to share in this value payment.

(1) [1931] 1 Ch. 515, 518.

(2) [1949] 2 K. B. 77.

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On the other hand, if his interest is a "short tenancy," then he is not entitled to participate in the value payment, and the only other claimants to it are the applicants, the landlords. The question therefore is: what is a "short tenancy"?

If the proper significance to attach to the deed of December 3, 1935, is that it extended an existing term from five years to twelve years, or extended an existing term of five years by an additional seven years, I do not think that it can be disputed that the tenant, in whom that term was vested, is a person entitled to a tenancy which is not "a short tenancy." On the other hand, if the true effect of that deed of December 3, 1935, is that it created *de novo* a fresh lease giving a tenancy to another lessee, I do not think it can be disputed that the tenant was a tenant of a "short tenancy." The rather difficult question which I have to decide is whether the deed of 1935 extended an existing term or created a new one: that is to say, was it a tenancy granted for a term of seven years and no more, or was it an extension of an existing term to more than seven years?

Mr. McMullen referred to s. 149 of the Law of Property Act, 1925, which, by sub-s. 1, abolished the ancient conception of *interesse termini* and then by sub-s. 2 provided that, as from the coming into force of the Law of Property Act, 1925, all terms of years absolute should take effect at law or in equity "from the date fixed for commencement of the term, "without actual entry."

Mr. McMullen called attention to the judgment of Swinfen-Eady J. in *Lewis v. Baker* (1), where the law as it then existed was stated with all the clearness and conviction which judgments of that very learned judge always commanded. The headnote reads: "As a reversionary lease merely "creates an *interesse termini* until entry thereunder, it does "not enlarge the term of the original lease." The question arose there with regard to the right to distrain, and with regard to the existence or non-existence of a proper legal reversion to support the right of distraint. Mr. McMullen also referred to the decision of Maugham J. in *Terroni and Necchi v. Corsini* (2), where the matter was debated in the light of the change of the law effected by the Act of 1925.

Of course, the expression "enlargement of a term" is a sort of metaphor: it is only a metaphorical way of expressing the significance and operation of the later of two deeds. It

(1) [1905] 1 Ch. 46.

(2) [1931] 1 Ch. 515.

is true that, in whichever way the later of these two deeds is described, the same practical result follows. It is indeed nothing more than a method of approach, and I think that one ought to look at the realities of the case. If this had been a fresh lease granted to the present tenant without regard to the past history of the matter, it would be surprising to find recitals as to the previous lease (though that no doubt was a useful way of shortening the document) and, more especially, the reference to the tenant as being the successor in title of his father. I think it not without significance—though it is not the determining factor in the case—that in the document of 1935, which must undoubtedly have been prepared by the landlords, both parts are endorsed in the terms already stated, that is, it is stated in both that this is a deed extending the term of an existing lease.

It seems to me that, where various lawyers' descriptions of the effect of the deed are all accurate so far as they go, the court is driven back to the realities of the situation. They seem to me to be that the landlords had granted a lease for five years, and that, before the expiration of those five years, an arrangement was made with the successor in title of the lessee for extending the five years' term of the existing tenancy to twelve years. I think the result was that at the material date (that is immediately before the war damage occurred) the tenant was in possession under a tenancy which constituted a proprietary interest, because I think that it was not a "short tenancy," that is, not a tenancy granted for a term of seven years or less, but one granted for twelve years. Although the other description which has been suggested as applicable to this document is a perfectly appropriate and adequate description of its general effect, in my opinion, on the whole, the right conclusion, having regard to the purpose and intention of the War Damage Act, 1943, is that there was at the relevant date an unexpired term of twelve years and not seven years.

I have been referred to *Lawrence v. Sinclair* (1), a case under the Landlord and Tenant Act, 1927. The decision of the Court of Appeal there was that the tenant under s. 4 of the Act of 1927 was entitled to be treated as a tenant for a period of not less than five years when he had a lease which was extended from time to time by a series of yearly tenancies. Although I do not know that that case binds me, I think that it guides me and throws light on the kind of approach

(1) [1949] 2 K. B. 77, 82.

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to be made to the particular problem which I have to consider : the court should look at the realities of the case. It was said by the Court of Appeal that it had been argued that into the words of sub-s. 1 of s. 4 "for a period of not less than "five years" there must be read the words "under one and "the same title," and they said that "there was no ground "for reading the sub-section in that way." So, here, I think that the period of seven years mentioned in the definition of "proprietary interest" is not necessarily a term of seven years in one and the same instrument, but that it may be a term of more than seven years subsisting under the combined effect of two or more instruments.

The sum paid into court, which represents, of course, only part of the value payment, has been determined by the War Damage Commission as that portion of the value payment which is attributable to the "proprietary interest" of the tenant, assuming that he had such an interest. If I had held that he had no "proprietary interest," it is obvious that I should have had to order that sum to be paid out to the applicant landlords; but, as I have held that he was entitled at the material date to a "proprietary interest," it follows that I must order that that sum be paid out to the tenant.

Order accordingly.

Solicitors : *Scadding and Bodkin ; Bridges, Sawtell & Co.*

I. G. R. M.

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[1949 I. 5090.]

Alien—Enemy property—Property in United Kingdom of King of Italy—War with Italy—Subsequent claim by Republic of Italy—Trading with the Enemy Act, 1939 (2 & 3 Geo. 6, c. 89), s. 7—Trading with the Enemy (Custodian) Order, 1939 (St. R. & O. 1939, No. 1198), para. 1 (i); para. 3 (i), (ii)—Treaty of Peace with Italy, 1947, art. 79, paras. 1, 2, 3—Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947 (10 & 11 Geo. 6, c. 23), s. 1—Treaty of Peace (Italy) Order, 1948 (S.I. 1948, No. 1117), para. 1 (1.), (2.).

On the outbreak of war with Italy in 1940, the property of King Victor Emanuel III of Italy in the United Kingdom vested in the Custodian of Enemy Property. On February 10, 1947, the Peace Treaty with Italy was signed. Article 79 empowered the United Kingdom to apply such Italian property as should be in its territory when the treaty came into force as the United Kingdom should desire, within the limits of its claims and of those of its nationals. So far as the United Kingdom was concerned, the liquidation and disposition of Italian property was to be carried out in accordance with the law of the United Kingdom, and Italian owners were to have no rights in that property save those given by that law. A financial agreement concluded in Rome between the Government of the United Kingdom and the Italian Government provided that Italian property held by the custodian and being liquid assets should be transferred to the Italian Government into a special account with the Bank of England for the payment of debts in the United Kingdom chargeable on Italian property. On September 15, 1947, the Peace Treaty with Italy came into force, and on December 28, 1947, the King of Italy died. Under the Treaty of Peace (Italy) Order, 1948, art. 79 of the treaty was to have effect as law as far as it could; and the property mentioned in the article was to be charged with the claims mentioned in it and could, at the direction of the Treasury, "be transferred . . . free of any such charge . . . in accordance with the terms of any . . . agreement "with the Government of Italy affecting the . . . property "to which His Majesty is or may be a party . . ."

Letters of administration to the King of Italy's property in the United Kingdom were granted to the defendants, a bank, as attorney-administrators; and the custodian, in good faith and at the direction of the Board of Trade, transferred the property to that bank without the Republic of Italy's approval or consent. The Republic brought an action claiming declarations that, at the date of that transfer, the property was subject to a statutory obligation or to a trust or fiduciary obligation to pay or apply it in accordance with the provisions of the financial agreement; that the transfer was effected wrongfully and in breach of that obligation; and that the bank had at all material times since the transfer held the property in breach of the obligation. They also claimed an injunction to restrain the bank from dealing with the property otherwise than in accordance with the obligation. The bank did not admit that the financial agreement was binding on or enforceable against them, and the custodian denied that it created rights or obligations enforceable in the court.

Held, in dismissing the action, that the financial agreement was not cognizable or justiciable in the court.

ACTION.

A financial agreement concluded in Rome on April 17, 1947, between the Government of the United Kingdom and

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the Italian Government provided that the Custodian of Enemy Property should transfer Italian property which he held to the Italian Government into a special account with the Bank of England, for the payment of debts in the United Kingdom which were chargeable on Italian property. Since the outbreak of war with Italy in 1940 there was vested in the custodian the property in the United Kingdom of King Victor Emanuel III of Italy. In September, 1947, the Peace Treaty with Italy came into force and in December, 1948, King Victor Emanuel III died. In March, 1949, letters of administration were granted to Hambros Bank, Ltd., as his attorney-administrators and early in 1949 the custodian, after paying death duties, paid and transferred the balance of the late King's property, at the direction of the Board of Trade, to Hambros Bank, Ltd.

In this action the Republic of Italy claimed among other things a declaration that that payment and transfer were in breach of a trust or obligation to pay or apply it in accordance with the financial agreement, and an injunction to restrain Hambros Bank, Ltd., from dealing with the property or any part of it otherwise than in accordance with that trust or obligation. Hambros Bank, Ltd. did not admit that the financial agreement was in any way binding on or enforceable against them; and the custodian denied that it created any obligations or rights enforceable in the court, at the suit either of the Republic of Italy or of any other person or body.

The facts are fully stated in the written judgment of VAISEY J.

Pascoe Hayward K.C., and *V. M. C. Pennington*, for the Republic of Italy. The direction by the Board of Trade, in the exercise of its discretionary authority, to pay and transfer the balance of the property to Hambros Bank, Ltd., was wholly ultra vires and wrongful. The financial agreement is justiciable, notwithstanding that it is between high contracting powers. Its terms were enforceable against the late King's property in the custodian's hands, and are therefore now enforceable against the balance of it in the hands of the defendant bank. With regard to this particular financial agreement, s. 7, sub-s. 1 of the Trading with the Enemy Act, 1939 (1) has a most important preamble.

(1) Trading with the Enemy "a view to preventing the pay-
Act, 1939, s. 7, sub-s. 1: "With "ment of money to enemies and

"of preserving enemy property
 "in contemplation of arrange-
 "ments to be made at the
 "conclusion of peace, the Board
 "of Trade may appoint cus-
 "todians of enemy property for
 "England, Scotland and Northern
 "Ireland respectively"

Trading with the Enemy
 (Custodian) Order, 1939,
 para. 1 (i): "Any money which
 "would, but for the existence
 "of a state of war, be payable
 "to or for the benefit of a person
 "who is an enemy, and any
 "money which is to be deemed
 "for the purposes of the Act to
 "be money which would, but
 "for the existence of a state of
 "war, be so payable, shall be
 "paid to the Custodian."

Paragraph 3 (i): "The Custodian shall, subject to the provisions of the next succeeding paragraph and except in so far as the Board of Trade either generally or in any specific case may otherwise direct or order, hold any money paid to him under this Order and any property or the right to transfer any property vested in him under any Vesting Order until the termination of the present war, and shall thereafter deal with the same in such manner as the Board of Trade shall direct."

(ii): "The Custodian, acting under a general or special direction of the Board of Trade, may at any time pay over any particular money paid to him under this Order or transfer any particular property in respect of which a Vesting Order has been made to or for the benefit of the person who would have been entitled thereto but for the operation of the Act or any Order made thereunder or to any person appearing to the

"Custodian to be authorized by
 "such person to receive the
 "same."

Treaty of Peace with Italy,
 art. 79, para. 1: "Each of the
 "Allied and Associated Powers
 "shall have the right to seize,
 "retain, liquidate or take any
 "other action with respect to
 "all property, rights and interests
 "which on the coming into force
 "of the present Treaty are within
 "its territory and belong to
 "Italy or to Italian nationals,
 "and to apply such property or
 "the proceeds thereof to such
 "purposes as it may desire,
 "within the limits of its claims
 "and those of its nationals against
 "Italy or Italian nationals, in-
 "cluding debts, other than claims
 "fully satisfied under other
 "Articles of the present Treaty.
 "All Italian property, or the
 "proceeds thereof, in excess of
 "the amount of such claims, shall
 "be returned."

Paragraph 2: "The liquidation
 "and disposition of Italian pro-
 "perty shall be carried out in
 "accordance with the law of the
 "Allied or Associated Power
 "concerned. The Italian owner
 "shall have no rights with respect
 "to such property except those
 "which may be given him by
 "that law."

Paragraph 3: "The Italian
 "Government undertakes to
 "compensate Italian nationals
 "whose property is taken under
 "this Article and not returned
 "to them."

Treaties of Peace (Italy,
 Rumania, Bulgaria, Hungary and
 Finland) Act, 1947, s. 1, sub-s. 1:
 "His Majesty may make such
 ". . . . Orders in Council
 "as appear to Him to be necessary
 "for carrying out the said
 "Treaties, and for giving effect

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"to any of the provisions
"thereof."

Financial Agreement between
the Government of the United
Kingdom and the Italian
Government, April 17, 1947.
Agreement relating to Italian
property held by the custodians of
the United Kingdom, and to the
payment of debts due from Italy to
persons in the United Kingdom:
"Whereas under Article 79 of the
"Treaty of Peace with Italy each
"of the Allied and Associated
"Powers has the right to seize,
"retain, liquidate or take other
"action with respect to all pro-
"perty, rights and interests which
"on the coming into force of
"the Treaty of Peace are within
"its territory and belong to Italy,
"or to Italian nationals, and to
"apply such property or the
"proceeds thereof to such purposes
"as it may desire, within the
"limits of its claims and those
"of its nationals against Italy
"or Italian nationals, including
"debts, other than claims fully
"satisfied under the Articles of
"the Treaty of Peace; and

"Whereas under the Treaty of
"Peace all Italian property or
"the proceeds thereof in excess
"of the amount of such claims
"shall be returned; and

"Whereas the Government of
"the United Kingdom is willing
"to relinquish all claims against
"such property other than the
"debts due from Italy to persons
"in the United Kingdom; and

"Whereas the Italian Govern-
"ment in consideration of such
"relinquishment desires to
"provide funds in the United
"Kingdom for the payment of
"such debts, the Governments of
"the United Kingdom and of
"Italy have reached the following
"Agreement:—

"1. The Government of the
"United Kingdom will transfer
"to the Italian Government all
"the liquid assets now held as
"Italian property by the
"Custodians.

"2. The Government of the
"United Kingdom will release to
"the original owners or to their
"legal representatives any Italian
"property now vested in or under
"the control of the Custodians
"other than the liquid assets
"referred to above or which
"under this Agreement may be
"liquidated later.

"3. The Italian Government
"will utilize the liquid assets
"transferred to it under this
"agreement for the payment of
"debts in the United Kingdom,
"and for this purpose will open
"a Special Account in the name
"of the Bank of Italy with the
"Bank of England into which will
"be paid the sterling so trans-
"ferred, and from which will
"be met the payment of the
"said debts.

"4. The Controller-General will
"give to the representative of
"the Italian Government in Lon-
"don, whom the Italian Govern-
"ment will nominate for this
"purpose, lists of all the Italian
"properties held by the
"Custodians, with all the
"particulars available of former
"ownership, and of the nature
"and the value or estimated
"value of each property.

"5. The Italian Government,
"through its special representa-
"tive, will notify the Controller-
"General . . . under which of
"the following three categories
"it desires that such non-liquid
"property should be treated,
"viz. :—(a) Properties to be
"realized in order to increase
"the sterling amount available

" for the payment of debts.
 "(b) Properties to be released to
 " the former owners or to their
 " legal representatives. (c) Pro-
 " perties the disposal of which
 " under (a) or (b) is to be deferred
 " for further consideration.

" 6. The Government of the
 " United Kingdom agrees to
 " realize any Italian property at
 " the request of the Italian
 " Government under clause 5 (a)
 " and to pay the proceeds, less
 " the expenses of sale, into the
 " Special Account referred to in
 " clause 3.

" 9. The Italian Government
 " undertakes to meet any deficit
 " on the Special Account referred
 " to in clause 3 after allowing
 " for the payment of debts under
 " this Agreement, but will be
 " entitled to the free use of any
 " excess on the Special Account
 " after the payment of the said
 " debts."

Treaty of Peace (Italy) Order,
 1948, para. 1 (1.): " So far as
 " they are by their nature capable
 " of so doing, the provisions of
 " the Treaty set out in the First
 " Schedule hereto shall be and have
 " effect as law and for the purpose
 " of carrying out those provisions
 " the following provisions shall
 " have effect :—

" (1.) In this Article the expres-
 " sion ' property, rights or
 " ' interests ' includes real and
 " personal property, and any
 " estate or interest in real or
 " personal property, any negoti-
 " able instrument, any debt or
 " other chose in action, and any
 " other right or interest, whether
 " in possession or not ;

" (2.) All property, rights or
 " interests, being property, rights
 " or interests to which this para-
 " graph applies, are, subject to
 " the provisions of paragraph 7
 " of this Article, hereby charged

" with the amounts due at the
 " date when the Treaty came into
 " force in respect of claims by
 " His Majesty . . . and by
 " British nationals . . . against
 " the Government of Italy or
 " Italian nationals including
 " debts owing to Him or them
 " by the Government of Italy
 " or Italian nationals, other than
 " claims fully satisfied under any
 " articles of the Treaty other than
 " Article 79 :

" Provided that any such pro-
 " perty, rights or interests so
 " charged as aforesaid or the
 " proceeds thereof may (i) on the
 " direction of the Treasury, be
 " transferred by the Adminis-
 " trator hereinafter mentioned,
 " free of any such charge in
 " accordance with the provisions
 " of any Agreement on the reso-
 " lution of conflicting claims to
 " Italian property, rights or
 " interests to which His Majesty
 " may be a party or in accordance
 " with the terms of any other
 " Agreement with the Government
 " of Italy affecting the said
 " property, rights or interests to
 " which His Majesty is or may be
 " a party ; and (ii) on the
 " direction of the Board of Trade
 " be released by the said Adminis-
 " trator from the said charge ;

" (4.) With a view to making
 " effective and enforcing such
 " charge as aforesaid ; (a) the
 " Board of Trade may appoint
 " on such terms as they may
 " specify an Administrator who
 " shall act under the general
 " direction of the Board and shall
 " have such powers and duties as
 " are hereinafter provided.

" The First Schedule. Part VII.
 " Property, rights and interests.
 " Section II. Italian property in
 " the territory of Allied and
 " Associated Powers. Article 79."
 (The article is here set out.)

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Whatever property the custodian holds he holds in a very special capacity and, while he holds it, the beneficial interest in it is in a state of statutory suspense. [*In re Münster* (1) and *In re Gourju's Will Trusts* (2) referred to]. It is to be expected that, at the conclusion of peace, there would be an "arrangement"—within the meaning of the word as used in s. 7, sub-s. 1 of the Trading with the Enemy Act, 1939—to relieve that suspense, and to put the beneficial interest in some person; and also that any document concerned, as is the financial agreement, with property in the custodian's hands will relieve the suspense and will be cognizable in order to be able to do so effectively. Article 79 of the Peace Treaty clearly is cognizable by virtue of the Treaty of Peace (Italy) Order, 1948; and the financial agreement, which recites the article, was made in order to carry its terms into effect.

A further ground for saying that the financial agreement has received statutory recognition is that it is only in pursuance of statutorily recognized documents that the Crown can in any way deal with enemy property after the conclusion of peace—if, indeed, the Crown can do so at all. Only Parliament can override a former enemy's prima facie right to recover in this country what was originally his. The Crown has agreed that the liquid assets of private persons shall be paid over to the Italian Government. It had no right so to agree. [Counsel referred to *Salaman v. Secretary of State for India* (3) and *Civilian War Claimants' Association v. The King* (4).]

In the present case the Treaty of Peace (Italy) Order, 1948, constitutes sufficient statutory recognition of the Treaty; and, as it follows that the financial agreement must also be cognizable, the court should not hesitate to give effect to it. [*Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* (5), and *Stoeck v. Public Trustee* (6) referred to.] The opening words of para. 1 of the Treaty of Peace (Italy) Order, 1948, mean that all the following provisions in the paragraph, including the proviso to sub-para. 2, are intended to carry out, among other things, art. 79. In the proviso the word "may," in the expression "may, on the direction of the Treasury, be transferred," includes a power coupled with

(1) [1920] 1 Ch. 268.

(2) [1943] Ch. 24.

(3) [1906] 1 K. B. 613.

(4) [1932] A. C. 14.

(5) [1941] A. C. 308.

(6) [1921] 2 Ch. 67.

a duty. The agreement affects such of the "said property, "rights and interests" as are in the custodian's hands and comes within the scope of the words "any other agreement" in the first part of the proviso, where the reference is clearly to the financial agreement. Since the power conferred by the word "may" in the first part of the proviso is coupled with a duty, it is the duty of the Treasury to exercise the power and of the administrator to transfer the property to the plaintiff. Even if that be not so, however, and the word "may" is not mandatory but only permissive, that is enough to establish the plaintiff's case, for it shows that both the legislature and the draftsman of the Order intended the financial agreement to be carried into operation. Further, the draftsman's reference to "any other agreement . . . "to which His Majesty is or may be a party" shows by the use of the word "is," that he must have had the terms of existing agreements in mind; and the financial agreement was concluded well before the Order came into force. Even apart from the question whether the word "may" in the first part of the proviso to para. 1, sub-para. 2 of the Order means "shall," the first part of the proviso is a statutory recognition sufficient to make the terms of the financial agreement cognizable. [Counsel referred to *Julius v. Bishop of Oxford* (1).]

As the financial agreement is thus part of English law, the defendant bank cannot claim to be in any better position than the custodian himself, who ought not to have parted with the property in the first place. The bank are pure volunteers, the property is easily traceable in their hands, and the court can quite easily order them to re-transfer it to the custodian. When the war ended, the power given by art. 3 (ii) of the Trading with the Enemy (Custodian) Order, 1939, was over-ridden by the duty, arising under art. 3 (i), "thereafter" to "deal with the same in such manner as the Board of Trade "shall direct."

The giving effect to "arrangements"—of which the financial agreement is one—is the sole purpose of the duty of the custodian and of the correlative right of the Board of Trade to direct. All that the Board of Trade can do is to "direct" the custodian in such a way that the terms of the financial agreement will be carried out. The Trading with the Enemy

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(Custodian) Order, 1939, was not intended to, and does not, give the Board of Trade power to override an arrangement made at the end of the war. The Italian Government accepts in the fullest sense that everyone concerned on the British side with the implementation of the financial agreement acted completely bona fide and with complete impartiality, and accepts also that, when the payments complained of were made, those responsible believed that they were acting in accordance with the wishes of the Italian Government. In fact, the actual effect of the payment and transfer to Hambros Bank, Ltd., has been to increase the Italian Government's liability to meet any deficit on the special account in the Bank of England, and correspondingly to decrease the likelihood of there being any excess on that account of which it may have the free use: and the Republic of Italy now ask for the declarations and injunction claimed in the action.

Upjohn K.C., Cozens-Hardy Horne, and John Megaw for the defendant bank. The action is misconceived, and is a frivolous and vexatious attempt to prevent the late King's estate from obtaining something that is due to it. Passing reference to the financial agreement—and that is all that there is, for it is nowhere referred to in terms—is not enough to constitute statutory recognition of it. For that, something must be found which quite plainly makes it part of English municipal law: *In re Californian Fig Syrup Company's Trade Mark* (1); *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* (2). The "arrangement" which, it was quite properly contended, was "to be expected to be made" on the conclusion of peace was not the financial agreement, but the Peace Treaty itself. It gave the British Government rights, on behalf of British nationals, to seize property, appoint administrators and create a charge on the property. The mere fact that the financial agreement carries out the terms of art. 79 does not of itself show whether that agreement was or was not to become part of English municipal law. The Treaty of Peace (Italy) Order, 1948, does expressly incorporate art. 79; but it does not, expressly, even refer to the financial agreement. Also, it just is not the case that the Crown cannot effectuate the financial agreement unless it is recognized as part of English municipal law. It was made effective by

(1) (1888) 40 Ch. D. 620.

(2) [1941] A. C. 308.

working out, under the Treaty of Peace (Italy) Order, 1948, a scheme placing the getting in of the assets entirely in the hands of the British Government. The agreement with the Italian Government is concerned only with the disposal of the assets. Even if the financial agreement were part of English municipal law, its being so would not alter the fact that that the administrator is the only person who can collect the property and enforce the charge: the Italian Government cannot sue for it; it has, indeed, no locus standi before the court. The Board of Trade's order to the custodian was not ultra vires, for the regulations which it has power to make under the Trading with the Enemy Act, 1939, cannot be challenged so long as they are within the terms of that Act. [They referred to *Rex v. Comptroller-General of Patents* (1).]

Charles Russell K.C. and *Denys Buckley* for the Custodian of Enemy Property. The custodian had assets, or the right to transfer them, vested in him by statute. He was not anyone's agent, or trustee for anyone. At the direction of the Board of Trade, he dealt with the assets in a particular way. As he was bound by the Finance Act, 1944, to do, he paid estate duty out of the assets in his hands; and, at the Board of Trade's direction and under the appropriate provision of the Trading with the Enemy (Custodian) Order, 1939, he very properly paid to himself the charge to which he was entitled. All that was vested in him was the right to transfer property. Had it really been intended that the Treaty of Peace (Italy) Order, 1948, should give the financial agreement the effect of law—in the sense that it would revoke or override previous statutory obligations and rights—that would have been plainly stated and the financial agreement would have been scheduled to the Order. If the Italian Government have a grievance—and the custodian understands perfectly well what they say their grievance is—it can only be against the British Government and cannot be against either party to this action. The basis of the grievance is that two States have come to terms on the matter and that one of them has not complied in full with its part of those terms. That, normally, is not a matter susceptible of adjudication in the courts of either country, but is for diplomatic negotiation and agreement. So far as the custodian is concerned, the present action should fail.

(1) [1941] 2 K. B. 306.

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Pascoe Hayward K.C., in reply. In *In re Californian Fig Syrup Company's Trade Mark* (1), there was no recognition at all of the convention there in question, so that that case gives no guidance as to the measure of incorporation or recognition that is necessary before a treaty becomes cognizable. Certainly, if that measure exists in the case of the financial agreement, it must be found in the Treaty of Peace (Italy) Order, 1948, and nowhere else. Whether the court is satisfied that there is a sufficient measure of recognition is a question of degree. If it were expressly referred to, the Republic of Italy's case would be a good deal stronger: but there is no authority that there must be express reference. In the proviso to art. 1 (2.) of the Treaty of Peace (Italy) Order, 1948, it must have been intended to give statutory recognition to the agreements to which the first part of the proviso relates; and in that connexion the word "may" in the expression "may on the direction of the Treasury, be transferred . . ." must mean "must" within the meaning of the decision in *Julius v. Bishop of Oxford* (2). If the financial agreement is not cognizable in the courts of the United Kingdom, then, every time that money is paid over to the Italian Government pursuant to that agreement, it is wrongfully so paid. That, quite obviously, cannot possibly be the case, because exactly the same reasons as were valid for according statutory recognition to art. 79 of the Treaty are valid for according it to the financial agreement.

Cur. adv. vult.

Feb. 9. VAISEY J. read the following judgment:

I wish to say at the outset that what I know of this case (though my knowledge is admittedly imperfect) has not a little disturbed me, for it was hinted to me (or perhaps rather more than hinted) that there had been some misapprehension of fact (entertained by I know not whom) which had given rise to the transactions of which the Republic of Italy, the plaintiffs in this action, are complaining. I gather that some person or authority (not identified) had acted in the erroneous belief that the plaintiffs had either given their previous consent to those transactions, or could be safely assumed to be willing to accord their subsequent approval to those transactions.

(1) 40 Ch. D. 620.

(2) 5 App. Cas. 214.

I desire, therefore, to express myself with reserve, and to confine my judgment to what I conceive to be the one and only issue before me, that is to say, whether the plaintiffs can in this court and in this action obtain as against the defendants the relief which they are seeking, or any part of such relief. Have the plaintiffs a cause of action? Are these proceedings maintainable? Or are they, in the time-honoured expression, "frivolous and vexatious and an abuse of the "process of the court" (words familiar in our legal phraseology, though they might appear to the uninstructed to be somewhat incongruous when applied to such a case as the present)? I do not like even in appearance to attribute to the Republic of Italy, to those who direct its fortunes or to those who speak in its name, any feelings of, or even akin to, levity or disrespect, or to imply, however remotely, the existence of some possible impropriety in the method of their approach to this court. I would rather put the alternatives thus: is the action maintainable, or is it misconceived?

The point seems indeed to be narrowed down to this, whether the terms of a certain agreement, arrangement or bargain made in Rome on April 17, 1947, between the Government of the United Kingdom, acting by His Majesty's Ambassador there, and the Government of Italy, acting by the Count Sforza, its Foreign Secretary, which I may conveniently call "the financial agreement," are or are not justiciable or cognizable in the courts of this country, as forming part of our municipal or domestic law; or is it the outcome of a negotiation between high contracting parties, resulting in a treaty, placed apart from and above our general law, and so outside my ken and purview? It was frankly admitted by their counsel that the plaintiffs' rights, if any, arise out of the financial agreement and have no other source, and that, unless the former of the two alternative views which I have just formulated can be established, their case must necessarily fail.

The action concerns the private fortune in this country of the late King Victor Emanuel III of Italy, which is said to have amounted to some 1½ million pounds sterling in value. At the outbreak of the war between this country and Italy, that fortune, consisting partly of cash, partly of British Government securities, and partly of investments quoted on the London Stock Exchange, became vested in the Custodian of Enemy Property, the second defendant, under and for the purposes

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of the Trading with the Enemy Act, 1939, and the orders and regulations made thereunder.

On or about May 9, 1946, the late King (who is admitted to have been at all material times an "Italian national") abdicated from his throne. On December 28, 1947, he died in exile. On March 5, 1949, letters of administration to his estate were granted out of the Principal Probate Registry to Hambros Bank, Ltd., the first defendants, as attorney-administrators. This action is brought by the plaintiffs, the Republic of Italy, against the bank and the custodian. There is no other party to the action.

On February 10, 1947, a Treaty of Peace between the United Kingdom and certain other powers on the one hand and Italy on the other hand was signed in Paris, and having been ratified by Italy on September 15, 1947, came into force on that day in accordance with its terms. This Treaty of Peace is a very lengthy document, but I need only refer to so much of art. 79 of it as empowered the United Kingdom to seize, retain, liquidate or take any other action with respect to all property, rights and interests which on the coming into force of the Peace Treaty were within its territory and belonged to Italy or to Italian nationals, and to apply such property or the proceeds thereof to such purposes as it might desire within the limits of its claims and those of its nationals (including certain debts) followed by a direction that all Italian property or the proceeds thereof in excess of the amount of such claims should be returned, meaning, I think, returned to the former owners of the property. Paragraph 2 of the said art. 79 provided that the liquidation and disposition of Italian property should be carried out so far as the United Kingdom was concerned in accordance with our law, and that the Italian owner should have no rights with respect to such property except those which might be given to him by our law.

I now turn to the financial agreement which was entered into, as I have said, on April 17, 1947. It took effect, according to its terms, on the date of the ratification of the Peace Treaty by Italy, that is to say, on September 15, 1947. It is printed by His Majesty's Stationery Office as "Treaty Series No. 31, "1947." It sets out the provisions of art. 79 of the Peace Treaty, and recites that the Italian Government, in consideration of the relinquishment by the United Kingdom Government of certain of the debts mentioned in that article

desired to provide funds in the United Kingdom for the payment of certain debts which had not been so relinquished. Its operative parts deal with the liquidation and disposal of Italian property (thereby defined as meaning all property which on the relevant date, that is, September 15, 1947, was held by, among others, the defendant custodian as belonging to Italy or Italian nationals) including, I should suppose, the property of the late King. It covered (a) Italian property consisting of liquid assets and (b) other Italian property. Liquid assets were to be transferred to the Italian Government to be utilized by them for the payment of the debts in this country with which Italian property was intended to be charged as I shall presently mention, and the Italian Government was to open an account, referred to as the Special Account, in the name of the Bank of Italy with the Bank of England into which the said liquid assets were to be paid. It would certainly seem that such of the late King's property as on September 15, 1947, consisted of cash in the hands of the custodian was liquid assets within the meaning and for the purposes of the financial agreement. As regards other Italian property, the financial agreement provided that it should at the request of the plaintiffs be realized and the net proceeds paid into the special account, with the object, so far as I can see, of increasing the amount available for the payment of the debts. The plaintiffs were to be liable for any deficit on the special account and were to be entitled to the free use of any surplus that might remain.

The chronological order of events in this case is rather confusing, but I must next refer to the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947, which received the Royal assent on April 29, 1947. This Act empowered His Majesty to make Orders in Council to give effect to the said Peace Treaty. Accordingly, by the Treaty of Peace (Italy) Order, 1948, it was directed that the provisions of (among other things) art. 79 of the Peace Treaty should (so far as they were by their nature capable of doing so) be and have effect as law and that the property rights and interests therein mentioned (that is to say, the Italian property rights and interests referred to in the said article) should be charged with the claims (including debts) therein mentioned. The Order further provided that any such property rights and interests so charged might, under the direction of the Treasury—and I quote the exact words—“be transferred

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“ free of any such charge in accordance with the
“ terms of any agreement with the Government
“ of Italy affecting the said property rights and interests to
“ which His Majesty is or may be a party.”

It is here, if anywhere, that the financial agreement is brought into and made part of the law of this country. But there are obvious difficulties about that view of the matter. In the first place, the words are permissive, not obligatory. Secondly, if the financial agreement was intended to be referred to, why was it not expressly mentioned? Thirdly, is there any authority or principle which enables me to hold that a contract such as the financial agreement made between high contracting parties and having all the appearance of a treaty can be imported into and incorporated in our domestic law by mere vague allusion, when there would have been no difficulty at all in doing so expressly and when an obvious opportunity for doing so presented itself?

The points which seem to me to arise are these: first, did the financial agreement confer rights on the plaintiffs which are enforceable in this court? Secondly, are those rights enforceable against the custodian? Thirdly, are they enforceable against property in the hands of the defendant bank? Unless the first of these questions is answered in the affirmative, the action fails in limine. In my judgment, the reported decisions contain nothing to support and everything to negative its being so answered. I have been referred to the following, among other cases: *In re Californian Fig Syrup Company's Trade Mark* (1); *Salamon v. Secretary of State for India* (2); *Stoeck v. Public Trustee* (3); *Civilians War Claimants Association v. The King* (4); and *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* (5). None of these authorities assists the plaintiffs in contending either that the financial agreement is not, in substance, a treaty or that I can, in such an action as this, take cognizance of it. It is to be observed that neither of the two defendants was a party to the financial agreement and that the British Government, which was a party to it, is not a party to this action.

What happened was this: the custodian, admittedly in good faith, and acting under directions of the Board of Trade (as he was entitled and probably bound to do) but without

(1) 40 Ch. D. 620.

(2) [1906] 1 K. B. 613.

(3) [1921] 2 Ch. 67.

(4) [1932] A. C. 14.

(5) [1941] A. C. 308.

the consent or approval of the plaintiffs, in the early months of the year 1949 parted with the whole of the late King's property. A sum of 78,248*l.* was applied in purported satisfaction of a claim for the estate duty payable on the late King's death, and the balance was handed over to the defendant bank as the attorney-administrators of the late King's estate.

The plaintiffs say that this was contrary to and inconsistent with the terms of the financial agreement and that they are prejudiced thereby by the increase pro tanto of their liability to meet any deficit on the special account and by the reduction of the amount of the surplus or possible surplus on that account. It certainly looks as if the plaintiffs were very closely concerned in the matter, having regard to the financial agreement, and I cannot understand why they were not consulted. The financial agreement appears to be still in operation. Was it forgotten or overlooked on this occasion?

I end, as I began, in an atmosphere of some bewilderment. There must surely be some explanation of what is to me so inexplicable. Italy's entry into the war as an enemy of this country was a tragedy, and I cannot believe that the further, though minor, tragedy of a misunderstanding will be allowed to ensue now that peace is restored. Any person who has created or contributed to such a misunderstanding must have done (I should have thought) a grave disservice to both countries.

I dismiss this action on the ground that the financial agreement is not cognizable or justiciable in this court, but it is only right that I should add that, even if it were, I doubt whether the necessary parties to any action to enforce its terms are before me. I shall make no order as to the costs, except to direct that the cost of taking the shorthand note of the two days' hearing and the provision of one transcript for my use should be divided equally, half and half, between the plaintiffs and the defendants.

Judgment for the defendants.

Solicitors : *Coward, Chance & Co.* ; *Norton, Rose, Greenwell & Co.* ; *Solicitor, Board of Trade.*

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HOLLAND *v.* DUNCAN AND OTHERS.

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[1949 B. 5558]

Jan. 27. Will—Construction—Division *per stirpes* or *per capita*—Gift “unto
“and equally between the children of my deceased sister X and the
“said Y absolutely.”

By her will dated June 5, 1945, a testatrix appointed F. H. to be the sole executrix and trustee, and gave all her estate “unto and “equally between the children of my deceased sister T. and the “said F. H. absolutely. Provided always that if any child or “children of my said deceased sister shall die in my life- “time leaving issue who shall survive me then such issue “shall take and if more than one in equal shares the share or “shares which his her or their parent or parents would have “taken had he/she or they survived me.” The testatrix died on May 28, 1949, and two children of the deceased sister survived the testatrix. F. H., as sole executrix, took out a summons to have determined whether, on the true construction of the will, the third defendant (her only child) was entitled to a share of the residuary estate and whether that estate should be divided *per capita* or *per stirpes* among the persons entitled to it.

Held, (1.), on the true construction of the will, that the gift to “the children of my deceased sister T. and the said F. H.” meant a gift to the children of that sister and to the individual F. H. and, accordingly, that the third defendant took no interest.

In re Dale [1931] 1 Ch. 357, and *In re Cossentine* [1933] Ch. 119, followed.

(2.) That the residue was divisible *per stirpes*. *In re Harper* [1914] 1 Ch. 70; *In re Cossentine* (supra); *In re Alcock* [1945] Ch. 264; *In re Hall* [1948] Ch. 437; *In re Jeffrey* [1948] 2 All E.R. 131; *In re Jeeves* [1949] Ch. 49, considered.

ADJOURNED SUMMONS.

By her will dated June 5, 1945, Adeline Birkett, who died on May 28, 1949, appointed Frances Holland to be the sole executrix and trustee, and gave devised and bequeathed all her estate both real and personal and of whatsoever kind or nature, “unto and equally between the children of my deceased “sister Mrs. Toyne and the said Frances Holland absolutely. “Provided always that if any child or children of my said “deceased sister shall die in my lifetime leaving issue who “shall survive me then such issue shall take, and if more “than one, in equal shares the share or shares which his, “her or their parent or parents would have taken had he, she

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

"or they survived me." Mr. A. Toyne died in 1944, leaving two children, who both survived the testatrix and were the first and second defendants. Mrs. Toyne had one other child, who had died a spinster in 1917. Frances Holland, the executrix, had only one child, Roland Holland, and he was the third defendant.

The summons was taken out by the executrix asking whether, on the true construction of the will, the third defendant was entitled to a share of the residuary estate and whether that estate should be divided per capita or per stirpes among the persons entitled to it.

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H. A. Rose for the plaintiff executrix.

M. Browne for the first and second defendants, nieces of the testatrix.

Settle for the third defendant.

The arguments appear sufficiently from the judgment.

DANCKWERTS J. [referred to the facts and continued:] The first question which arises on this will is whether the reference to "Frances Holland" in her individual capacity is linked up with the reference to "children" in the earlier provision, so that the bequest is of a share not to Frances Holland herself but to her child. Counsel for the plaintiff called attention to *In re Dale* (1) and *In re Cossentine* (2), which show plainly that the prima facie rule with a gift of this kind is that the parent is referred to rather than the child. "A gift to the children of A. and B. in equal shares or to be equally divided between the children of A. and B, should be construed as a gift in equal shares to the individual B. and the children of A." The context and circumstances in this case support the application of that prima facie rule.

Mrs. Holland was a stranger in blood to the testatrix as opposed to the sister whose children are referred to. Further, it would be difficult to apply the substitutional clause to the children of Mrs. Holland. She has only one child, who was born some forty or fifty years before the death of the testatrix. The testatrix must have known that she had only that one child and also that Mrs. Holland was unlikely to have another child. Therefore, I have no difficulty in reaching the con-

(1) [1931] 1 Ch. 357.

(2) [1933] Ch. 119.

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clusion that the last defendānt cannot take any interest under this bequest.

The next question is whether distribution is to be per capita between the three persons entitled, or stirpittally so that Mrs. Holland takes one-half and the children of the deceased sister take the other half equally between them. That matter is not so clear, and there are a number of authorities which, if reconcilable, must have proceeded on some rather fine distinctions.

Prima facie it appears that the rule is distribution per capita, and counsel referred to *In re Alcock* (1), *In re Hall* (2), *In re Jeeves* (3), *In re Jeffrey* (4), *In re Harper* (5), and *In re Cossentine* (6). It is plain from those cases that there is some prima facie rule in favour of a per capita construction, but Harman J. in *In re Hall* (2) did say that the context might easily displace that rule.

On the other hand, Vaisey J., in *In re Jeeves* (3), found great difficulty in reconciling these cases, and suggested that it was perhaps a matter of guesswork what was the proper conclusion to reach in any particular case.

Counsel for the plaintiff argued that the context and circumstances in this case displace the prima facie rule. He points out that Mrs. Holland and the children of the deceased sister belong to different generations. That was questioned by counsel for the defendant, but I think that it was a correct argument. Surely the testatrix and her friend, Mrs. Holland, and her deceased sister, must be regarded as being one generation in popular language, and the children of the sister, must therefore belong to another generation.

That does seem to me to be an argument in favour of applying a stirpittal construction. Harman J. in *In re Hall* (2) said that cases of stirpittal distribution were cases of what he called family distribution, and counsel for the plaintiff argued that the present case was a case of that kind because the sister's children represented the family. I do not think much help can be drawn from that argument because it appears from *In re Harper* (5), and *In re Cossentine* (6), which were cited by counsel for the defendant, that where there was so to speak, a family on one only side of the bequest, the rule

(1) [1945] Ch. 264.

(2) [1948] Ch. 437.

(3) [1949] Ch. 49.

(4) [1948] 2 All E. R. 131.

(5) [1914] 1 Ch. 70.

(6) [1933] Ch. 119.

enunciated by Harman J., if he meant to enunciate a rule at all, does not apply.

The third argument put forward by counsel for the plaintiff has, however, some force. Mrs. Holland had looked after the testatrix and another sister from 1939 to 1945 when the sister died. After that the testatrix went to live with Mrs. Holland as a paying guest. I think that the testatrix would have wished to reward such a friend to whom she was under some obligation, not merely on an equal footing with the two children of her deceased sister but on a better footing.

Therefore, in spite of the prima facie rule, I think that there are sufficient circumstances in the present case to lead me to infer, not merely by guesswork but by a matter of inference, that the testatrix intended a stirpital distribution under which Mrs. Frances Holland takes one-half and the children of the deceased sister take equally between them.

Declaration accordingly.

Solicitors (plaintiff and third defendant): *Tarry, Sherlock and King for Clappen and Weaver, Winton, Bournemouth*; (for the first and second defendants): *Gibson and Weldon, for R. P. Fletcher, Sheffield.*

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[1948 D. 1692.]

C. A.

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Jan. 30, 31;
Feb. 1, 2,
3, 17;
Mar. 6.

International law—French subject's bar gold looted by Germans—Recovery by Allies—Deposit at Bank of England for safe custody—Action by owner against Bank—Whether gold bars in possession or control of depositing Governments.

Evershed M.R.
Somervell and
Cohen L.JJ.

The Bank of England held, for safe custody, sixty-four numbered bars of gold which had been looted in 1944 by the Germans from a French bank which was then holding them on behalf of the plaintiffs, a French company. The bars were recovered in Germany and lodged with the Bank of England by the Governments of the United Kingdom, France and the United States for safe custody pending their ultimate disposal. The plaintiffs claimed

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from the Bank of England delivery of the bars, an injunction restraining the bank from parting with possession of them otherwise than as directed by the plaintiffs, and (alternatively) damages.

The Bank of England applied by motion to have the writ set aside and all subsequent proceedings in the action stayed, on the grounds that the bars of gold were in the possession or control of the three governments and that the action impleaded two foreign sovereign states which declined to submit to the jurisdiction of the court. The plaintiffs moved the court for an interlocutory order to restrain the bank from parting with the gold bars. Jenkins, J., held that the gold, notwithstanding its delivery to the bank, must be regarded as still in the possession of the three governments for the purposes of the bank's immunity; that the court had no jurisdiction to entertain the plaintiff company's action; that the motion of the bank succeeded; and that all further proceedings in the action, including the plaintiffs' motion, must be stayed.

On the last day of the hearing in the Court of Appeal further evidence was given on behalf of the bank, from which it appeared that it had then been discovered that between December 30, 1948, and January 26, 1949, and after the issue of the writ in the action, thirteen of the sixty-four gold bars had been sold by mistake.

Held, that, having regard to the sale in error of the thirteen gold bars, the bank could not invoke the rule of sovereign immunity; that it was also impossible for the same reason for the bank in the present application to assert that any of the sixty-four bars had at any relevant date been in the possession or control of the three governments; and that the action must be allowed to proceed.

On the assumption that the sixty-four gold bars had remained specifically allocated to the contract between the bank and the three governments and accordingly segregated from other customers' gold, their Lordships reached the following conclusions on the questions raised before Jenkins J.

Per Evershed M.R., the three foreign governments could not claim to have either physical or legal possession of the gold bars in the sense in which the word "possession" was used by Lord Atkin in *Compania Naviera Vascongado v. S. S. Cristina* [1938] A. C. 485; nor were they in the "control" of the three governments.

Per Somervell and Cohen L.J.J. The immunity of a foreign sovereign in regard to chattels in his possession or control was not lost by bailment for safe custody or for any other temporary purpose. The gold bars accordingly remained in the "control" of the three foreign governments.

Per curiam. Had they failed to show that they were entitled to pursue a claim for the return of the gold bars or to an injunction to restrain the bank from parting with them, the plaintiffs would not have been entitled to claim damages for detainment or conversion.

Compania Naviera Vascongado v. Cristina [1938] A. C. 485, followed.

Haile Selassie v. Cable & Wireless Ltd. [1938] Ch. 545; *Ancona v. Rogers* (1876) 1 Ex. D. 285, considered.

Decision of Jenkins J. [1949] Ch. 369, reversed in the light of new evidence.

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APPEAL from Jenkins J. (1).

The facts of the case were fully stated in the judgment of Jenkins J. appearing in the report of the proceedings in the court below (2), and for the purposes of the present report the following summary, taken substantially from the judgment of Cohen L.J., will suffice.

Before the outbreak of war, the plaintiffs were admittedly the owners of sixty-four identifiable gold bars which were deposited in a private vault at Limoges, the key of which was retained by the plaintiffs. When the Germans were driven out of France in 1944, they seized these bars and took them to Germany, where in due course they were found by the American troops in 1945. On January 14, 1946, an agreement was made in Paris between a number of the allied governments, which dealt with various matters in relation to German reparation. Part III of the agreement contained provisions in regard to "Restitution of Monetary Gold," paras A., E. and F. being in the following terms: "A. All the monetary gold found "in Germany by the allied forces and that referred to in "para. G. below (including gold coins, except those of numis- "matic or historical value, which shall be restored directly "if identifiable) shall be pooled for distribution as restitution "among the countries participating in the pool in proportion "to their respective losses of gold through looting by, or "wrongful removal to, Germany. E. The various countries "participating in the pool shall supply to the Governments "of the United States of America, France and the United "Kingdom, as the occupying powers concerned, detailed and "verifiable data regarding the gold losses suffered through "looting by, or removal to, Germany. F. The Governments "of the United States of America, France and the United "Kingdom shall take appropriate steps within the zones of "Germany occupied by them respectively to implement dis- "tribution in accordance with the foregoing provisions."

In September, 1946, a Tripartite Commission was set up by the Governments of the United Kingdom, United States of America and France to implement Part III of the Paris agree- ment. A notice of its constitution was published in the

(1) [1949] Ch. 369.

(2) Ibid 370-380.

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London Gazette of September 27, 1946, its functions including those of assisting in the distribution of the available monetary gold and performing such administrative acts as might be necessary, including the opening and maintaining of banking accounts. In July, 1948, a quantity of gold, including the sixty-four gold bars in dispute in this action, were sent to the Bank of England to be placed to the credit of a gold set-aside account in the name of His Majesty's Treasury on account of the Governments of the United Kingdom, the United States of America and France. This account had been opened pursuant to a letter from the Treasury, dated March 9, 1948, and was described in that letter as an account to be operated by the representatives of the three governments on the Tripartite Commission: "for the deposit and eventual distribution of a portion of the gold looted by Germany from the occupied States of Europe and recovered by the allied occupation forces." When gold bars are deposited by a customer in a "gold set-aside" account, the normal practice of the bank is to ascertain the gold content of the bars deposited, to credit the customer with the quantity of ounces of fine gold discovered on assay, but not thereafter to treat the specific bars deposited as segregated in any way to the particular contract of deposit.

By the time the sixty-four gold bars were dispatched to England, the fact that the plaintiffs had, or might have, an interest in them was known, and on July 16, 1948, the Tripartite Commission wrote a letter to the governor of the Bank of England which contained the following paragraphs in relation to the gold bars: "2. The commission has received a request from the representative of France on the commission that certain gold bars which are included in the second consignment from Frankfurt, now on its way to the Bank of England, should be set aside pending receipt by the commission of a communication from the French Government 6. The commission would be grateful, providing such action does not present insuperable technical or administrative difficulties, if you could see your way to having these bars set aside intact on arrival, if they can be identified, pending receipt of a further communication from the commission on the subject." To this letter the bank replied on July 19, and in the course of its reply said: "The proposal which you make is acceptable to the Bank of England provided that at the time we receive the authority of the commission to

“ hold the gold at the disposal of the Bank of France we also
 “ receive instructions from them to ship the gold from London.
 “ As you are aware it is now contrary to the Bank of England’s
 “ practice to set aside specific bars in the name of the customer,
 “ but if the French act as indicated above it will not be
 “ necessary for the bank to do more than hold the gold at the
 “ disposal of the Bank of France.” The conditions thus
 specified do not appear to have been fulfilled. The bank duly
 ascertained the gold content of the bars, and on October 25,
 1948, wrote to the Tripartite Commission a letter (not before
 the judge in the court below) which contained the
 following paragraph: “ In this connexion I have to inform
 “ you that the fine gold content of the bars in question has
 “ been established as 25,679·605 fine ounces, which amount
 “ has accordingly been set aside today for the account of
 “ H.M. Treasury o/a the Governments of the United States,
 “ the United Kingdom and France. I would mention that
 “ in view of the circumstances outlined in your letter under
 “ reference these bars have been temporarily segregated
 “ pending the receipt of instructions as to their disposal.”
 On September 14, 1948, the plaintiffs’ solicitors wrote to the
 bank giving formal notice of their interest in the bars and
 asking for an assurance within fourteen days that the bank
 would not dispose of the gold without the consent of the
 plaintiffs, or without an order of a competent court. This
 assurance not being forthcoming, the plaintiffs on October 18,
 1948, issued the writ in this action claiming: “ 1. Delivery
 “ to the plaintiffs of sixty-four bars of gold and for damages for
 “ their detention. 2. Alternatively damages for conversion
 “ of the said bars of gold. 3. An injunction to restrain the
 “ defendants, their servants and agents from selling, charging,
 “ dealing with or parting with possession of the said bars of
 “ gold or any of them otherwise than as directed by the
 “ plaintiffs.”

On October 22, 1948, the plaintiffs moved for an injunction
 restraining the bank from dealing with the gold bars until
 judgment or further order. On November 5, 1948, the
 bank applied for an order setting aside the writ and staying
 all further proceedings on the grounds: “ 1. That the sixty-
 “ four bars of gold in the writ mentioned are in the possession
 “ or under the control of the Governments of the United States
 “ of America the Republic of France and the United Kingdom
 “ of Great Britain and Northern Ireland. 2. And that this

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“ action impleads two foreign sovereign States namely the
“ Governments of the United States of America and the
“ Republic of France who decline to submit to the jurisdiction
“ of this honourable court.”

Jenkins J. made an order staying all further proceedings, holding that, notwithstanding the delivery of the gold to the bank, it must be regarded as still in the possession of the three governments for the purpose of the doctrine of immunity, and that the court had no jurisdiction to entertain the plaintiff company's action. The company appealed.

After the arguments in the Court of Appeal had been concluded, further evidence was put in by the bank from which it appeared that, in order to give effect to the special arrangement made by the bank with the commission, instructions were given to the appropriate officer of the bank for three steps to be taken: namely (1.) the making of a separate stack or pile of the sixty-four bars; (2.) the placing upon that stack of a warning notice that the bars were not to be dealt with save after reference to “ high authority ”; and (3.) the attachment of a similar warning notice to the cards “ which constitute the bullion office records of the sixty-four “ bars ”; that the third of those steps was never in fact taken; and that “ on various dates between December 30, “ 1948, and January 26, 1949,” thirteen of the sixty-four bars were sold and delivered by the bank to outside purchasers.

Sir Frank Soskice S.G., H. L. Parker and Denys Buckley for the Crown (as amici curiae). We repeat the observations made at the hearing before Jenkins J., namely: that the foreign governments are most anxious that their attitude should not be regarded as unreasonable; that they consider themselves, in a sense, trustees of these gold bars, whether they are “ monetary ” or “ non-monetary ” or neither; and that it is for that reason that the foreign governments adopt the attitude which is known to the court.

Sir Andrew Clark K.C. and R. O. Wilberforce for the plaintiffs. The plaintiffs accept the statement of the law as enunciated by Lord Atkin in *Compania Naviera Vascongado v. S.S. Cristina* (1) that the courts of this country will not by their process seize or detain property which is “ in the possession or control ” of a foreign sovereign. That principle applies whether the foreign sovereign is a party to the proceedings or not. The

principle of immunity so stated is exhaustive: *Haile Selassie v. Cable & Wireless Ltd.* (1). Jenkins J. extended the principle enunciated by Lord Atkin to a case where the property in question is neither in the possession nor in the control of a foreign sovereign.

The property in respect of which immunity can be claimed is, first, property of which the foreign sovereign is the legal owner; secondly, property in the de facto possession of the sovereign or his agents; and, thirdly, property of which the foreign sovereign is in control. There is no case in which a sovereign has been granted immunity on the ground that the property was in his control, except where the property was at the same time in his possession. The maritime authorities are of no assistance, because in those cases the action is in rem. [They referred to *The Parlement Belge* (2), *Duke of Brunswick v. King of Hanover* (3), and *Gladstone v. Musurus Bey* (4).]

Morgan v. Larivière (5) shows that, where a foreign sovereign is interested in property in this country, if some one else also claims an interest in that property, the courts of this country will determine what are the rights of the other persons interested. The decision in *Twycross v. Dreyfus* (6) to which Jenkins J. referred has no bearing on this case. In that case the plaintiffs had no title to the property then in question. [They referred to *The Crimdon* (7), *Duff Development Co. Ltd. v. Kelantan Government* (8) Westlake's Private International Law (7th ed.) pp. 267, 275, and Cheshire's Private International Law (3rd ed.) pp. 132, 182.]

This is a claim in personam and not a claim in rem. In *The Davis* (9) the courts of the United States held that a right cannot be asserted which would take something out of the possession of a foreign sovereign. That case was applied in *Long v. The Tampico* (10), where the United States courts held that, if a ship were not being actually used by a foreign government, it could be seized.

In the case of a chattel on land it is not possible to have control without possession or custody. This is a case of bailment. A bailor does not retain control: see Pollock

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(1) [1938] Ch. 839.

(2) (1880) 5 P. D. 197.

(3) (1844) 13 L. J. (Ch.) 107.

(4) (1862) 1 H. & M. 495.

(5) (1872) L. R. 7 Ch. 550;

(1875) L. R. 7 H. L. 423.

(6) (1877) 5 Ch. D. 605.

(7) [1900] P. 171.

(8) [1923] 1 Ch. 385, 398.

(9) (1869) 10 Wallace 15.

(10) (1884) 16 Federal Reporter

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and Wright on Possession in the Common Law, p. 131. It is clear that a bailor has not possession. Possession must be in the bailee: *Ancona v. Rogers* (1). There is no ground for extending the doctrine of immunity to goods in the possession of a bailee. The rule granting immunity to a foreign sovereign should not be extended to a new class of case. It is submitted that on the facts of this case the Governments of the United States and of France are not in "possession or control" of these gold bars. Either the governments have only a credit with the bank to the value of the bars, or they are joint bailors. In neither case are the gold bars in their "possession or control."

If, contrary to that contention, it be held that the foreign governments have some kind of possession of the gold bars, then the plaintiffs are entitled to claim damages against the bank for detainment or conversion. This is a personal claim against the bank. The fact that as a result the foreign governments might have to indemnify the bank is not material. It is submitted that the action should be allowed to proceed.

Cross K.C. and *J. R. Lee* for the Bank of England. This case is within the principle laid down in *The Cristina* (2). With regard to the question raised as to bailment: a bailor is not necessarily the owner of the chattel which he bails. The bailee holds the chattel on behalf of the bailor. There is no real difference between the position of a bailee under a revocable bailment and that of a servant or agent. In law a bailor under a revocable bailment is in possession of the goods. If that view is wrong and a bailor has not possession in the legal sense of the term, the bailee holds possession for the benefit of the bailor and the bailee's possession should be treated as that of bailor. It is submitted that property in the hands of a bailee is in the possession of the sovereign, and that no injunction should be granted to restrain any dealings with such property. [They referred to Pollock & Wright on Possession in the Common Law, pp. 111, 145; to Story on Bailment (7th ed.) p. 101, and, also to *The Amazone* (3), *Ancona v. Rogers* (4), *Gladstone v. Musurus Bey* (5), *Smith v. Weguelin* (6), *The Parlement Belge* (7), *The Teruete* (8),

(1) (1876) 1 Ex. D. 285, 292.

(2) [1938] A. C. 485.

(3) [1939] P. 322; [1940] P. 40.

(4) 1 Ex. D. 285.

(5) 1 H. & M. 495.

(6) (1869) L.R. 8 Eq. 198.

(7) 5 P. D. 197.

(8) [1922] P. 259.

Morgan v. Larivière (1), *Twycross v. Dreyfus* (2), and *Duff Development Co. Ltd. v. Kelantan Government* (3).]

If the plaintiffs are not entitled to an injunction, it follows that they are not entitled to damages. The basis of the claim for damages is the failure of the bank to hand over the gold bars. Under the doctrine of immunity the court has no jurisdiction to order the bank to hand over the gold bars. The court will not entertain any claim for damages based on an allegation that the possession or control of property by a foreign sovereign is wrongful.

[Further evidence was then read disclosing that thirteen of the gold bars had been sold.]

Sir Andrew Clark K.C. in reply. The new evidence shows that there never was any bailment of these gold bars. All that the foreign governments were entitled to was the return of an equivalent amount of gold. The gold bars were not in the possession or control of the foreign governments. They were not entitled to demand their return, as the bank were under no obligation to deliver back these specific bars, but only their value. If there was a bailment, the gold bars are not in the "possession" of the foreign governments. "Possession" must be given its ordinary meaning in English law. The bank have at all times had sole and exclusive possession. Nor are the bars in "the control" of the foreign governments: there can be no "control" without physical possession. The control has throughout been in the bank. The doctrine of immunity should not be extended to cover this case.

Cur. adv. vult.

March 6. The following judgments were read:—

EVERSHED M.R. The facts of this case have been fully stated by Jenkins J., and are summarized in the judgment of my brother Cohen which I have had the advantage of seeing. I do not therefore find it necessary to relate them anew in this judgment. One small lacuna has been filled since the hearing by Jenkins J.: the learned judge observed (4) that there was only available to him the order of the French Government establishing the Tripartite Commission for Restitution of Monetary Gold. In this court we have also seen the order

(1) L. R. 7 H. L. 423, 424.

(2) 5 Ch. D. 605.

(3) [1923] 1 Ch. 385.

(4) [1949] Ch. 369, 372.

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of the British Government recorded in the London Gazette dated September 27, 1946. The matter is, however, unimportant, since the due establishment of the commission by acts of the three governments concerned has not been, and is not, contested. Moreover (at any rate as the argument has developed in this court) save for the fact that the deposit of the gold bars in question with the Bank of England was effected by the commission and that the claim for immunity on the part of the French and United States Governments has in fact arisen out of their co-operation with the British Government in the Tripartite Commission, the objects and jurisdiction of the commission have no relevance to the appeal.

But one other substantial matter of fact has been expanded by fresh evidence put before this court by consent. The report below sets out the letters passing between the Secretary-General of the commission and Mr. Hilton Clarke on behalf of the Bank of England on July 16 and 19, 1948, in reference to the terms on which the bank agreed to hold the bars in suit (1). Sir Andrew Clark (for the plaintiffs) read an extract from a further letter from the Bank of England to the commission dated October 25, 1948 (that is, one week after the issue of the writ in this action) the material part of which is as follows: "In this connexion I have to inform you that "the fine gold content of the bars in question has been established as 25,679·605 fine ounces, which amount has "accordingly been set aside today for account of H.M. Treasury "o/a the Governments of the United States, the United "Kingdom and France. I would mention that in view of the "circumstances outlined in your letter under reference these "bars have been temporarily segregated pending the receipt "of instructions as to their disposal." He also drew attention to the pencil note of the bank's official on the letter of July 16, 1948: "My reaction is that we can help if the French take "the gold away immediately." On this Sir Andrew Clark argued that the three governments could not now claim to be in either "possession" or "control" of the sixty-four bars in any intelligible sense of the language of Lord Atkin in the *Cristina* case (2) since, after the ascertainment of the fine gold content of the bars at 25,679·605 fine ounces, that quantity of fine ounces of gold was placed to the credit of the relevant account and the governments could not claim any

(1) [1949] Ch. 377, 378.

(2) [1938] A. C. 485.

rights in respect of the specific bars or any bars. An affidavit was then put in on the bank's behalf sworn by one of its officers, Mr. L. J. Menzies.

From this affidavit it was made apparent that the normal practice (since 1940) of the Bank of England, when gold bars are deposited by a customer, is to ascertain the gold content of the bars deposited, to credit the customer with the quantity of ounces of fine gold discovered on assay, but not thereafter to treat the specific bars deposited as segregated in any way to the particular contract of deposit. Mr. Menzies further stated that in the present case, although the fine-ounce content of the bars had been ascertained on October 25, 1948, and the requisite number of ounces of fine gold thereupon credited to the gold-set-aside account of the three governments, the bars nevertheless continued to remain segregated, and still so remained. He stated that this departure from regular practice was adopted "in view of the commission's "request referred to in the bank's letter of July 19, 1948," that is, in order to enable effect to be given to a request, if made (having regard to the plaintiffs' claim) for delivery of the bars to the Bank of France.

After all the arguments had been concluded it then and for the first time appeared (according to the statement made to us by Mr. Cross) that in fact, notwithstanding the "segregation" to which Mr. Menzies had deposed, certain of the bars had been sold by the bank to outside purchasers. An opportunity having been given by the court for further investigation of the true state of facts, a further affidavit was sworn by Mr. Menzies on February 16.

The narrative disclosed by this further affidavit was startling. It now appears that, in order to give effect to the special arrangement made by the bank with the commission, instructions were given to the appropriate officer of the bank for three steps to be taken, namely (1.) the making of a separate stack or pile of the sixty-four bars; (2.) the placing upon that stack of a warning notice that the bars were not to be dealt with save after reference to "higher authority"; and (3.) the attachment of a similar warning notice to the cards "which constitute the bullion office records of the sixty-four "bars"; that the third of those steps was never, in fact, taken; and that, so long ago as "on various dates between "December 30, 1948, and January 26, 1949," thirteen of the

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sixty-four bars were sold and delivered by the bank to outside purchasers.

Even before the filing of the second affidavit of Mr. Menzies I should have felt doubt whether it would have been right for the court, on such an application as is now before us, to proceed on the basis which had been assumed before Jenkins J., that is, on the basis that at all material times and as part of the contract of bailment between the commission and the bank, the sixty-four bars in suit were held by the bank, segregated from all other customers' gold and specifically allocated to that contract. For this is, after all, an application to stay proceedings in limine; and on such an application it is not common or proper to assume matters of fact, which may be in any doubt, favourably to the applicant. Moreover, (and to this matter I shall later return) Sir Andrew Clark has maintained with no little force that a plaintiff in an action in personam of this character should *prima facie* not be concerned with or embarrassed by the alleged rights of a purely contractual nature between the defendant and a third party *inter se*. I should therefore in any event have been inclined to think, even before Mr. Menzies' second affidavit, that the true legal relationship between the bank and the commission on the assessment of which the bank's claim to immunity might well depend, ought to be more closely investigated before any safe answer to the question before us could be given.

But, however that may be, the further evidence by Mr. Menzies has, to my mind, destroyed at a single blow the whole premiss on which the judgment below proceeded, and on which the bank's claim for a stay has necessarily rested. I am not to be taken as casting blame upon any individual, still less as impugning in the smallest degree the good faith of any officer of the bank or any of its advisers. But the fact that, at a time when there was pending an application by the bank to stay proceedings based essentially on the proposition that the possession or control of the bars remained with the bank's customer, thirteen of the sixty-four bars could be disposed of by an officer of the bank, and that that sale was so clearly within the ordinary scope of his duties that it should for nearly twelve months pass wholly unnoticed by those concerned on the bank's behalf to litigate before the court the claim to immunity, emphasizes in the clearest possible way, in my judgment, the caution with which applications of this kind for a stay of proceedings ought to be received by the court.

And the matters to which I have referred further show—conclusively to my mind—that it is quite impossible for the bank on the present application to establish either limb of the argument which is fundamental to its application, namely, that the bars were either in the possession or in the control of the three governments. So far as concerns the thirteen bars which have been sold by the bank, it is manifestly impossible, in my view, for the bank any longer to invoke the rule of immunity in answer to the plaintiffs' claim for damages for their conversion. And I am glad to be able to record that, if and so far as it may be necessary or relevant for the plaintiffs to rely for any purpose on the sale by the bank, no point will be taken by the bank on the ground that the sale occurred after the date of the writ.

But further, the circumstances relating to the sale of the thirteen bars make it, to my mind, no less impossible for the bank upon the present application to assert that any of the sixty-four bars were at any relevant date in the possession or control of the three governments. For the purposes of the present application it must, in my judgment, be taken as established that : (a) in the absence of special terms in the contract of bailment, gold bars deposited by a customer with the bank were never, after ascertainment of their fine-gold content, segregated or treated by either party to the contract as segregated from other gold deposited by the bank's customers or otherwise allocated to the particular contract ; (b) of the several essential steps proposed to be taken in the present case so as to create an exception to the general rule, one was never in fact taken ; and, consequently, (c) at no relevant date were any of the gold bars in suit, within any sensible use of the words, in the possession or control of the three governments.

In the result, the whole basis of the judge's decision having been destroyed, the appeal must, in my judgment, succeed, and the plaintiffs' action must be allowed to proceed. The bank will, of course, be entitled to set up such defences as they desire.

In the circumstances it is, strictly, unnecessary to consider further any of the difficult questions that have been argued. But, since the matter is one of obvious public importance on which the judge expressed certain conclusions, and out of respect to the careful arguments addressed to us, I think it

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right to express my own views on the substantial points that have been debated.

For this purpose I assume that the sixty-four gold bars have remained specifically allocated to the contract between the bank and the commission, and segregated from other customers' gold accordingly. On this assumption, can the bars fairly be said to be in the "possession or control" of the three governments within the meaning of that phrase as used by Lord Atkin in his speech already referred to in *The Cristina* (*Compania Naviera Vascongado v. S.S. Cristina* (1)) ? Since both parties to the appeal have accepted, without qualification, the validity of Lord Atkin's propositions, and have further been content, as I understand them, to treat those propositions as exhaustive, as Lord Greene M.R., stated them to be in the later case in the same year of *Haile Selassie v. Cable & Wireless Ltd.* (2), it is necessary, as a premiss to what follows, to cite the relevant passage from Lord Atkin's speech (1). It is as follows : "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions "of international law engrafted into our domestic law which "seem to me to be well established and to be beyond dispute. "The first is that the courts of a country will not implead "a foreign sovereign, that is, they will not by their process "make him against his will a party to legal proceedings "whether the proceedings involve process against his person "or seek to recover from him specific property or damages. "The second is that they will not by their process, whether "the sovereign is a party to the proceedings or not, seize or "detain property which is his or of which he is in possession "or control. There has been some difference in the practice "of nations as to possible limitations of this second principle "as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private "property. In this country it is in my opinion well settled "that it applies to both."

Mr. Cross, for the bank, has conceded that for the purpose of the appeal—and, I repeat, the present application on the bank's behalf is one for the stay of the proceedings in limine—the three governments must be treated as having no title of any kind to the sixty-four bars.

In the course of the argument examples were taken, for the purpose of testing its validity, of articles such as a picture or

(1) [1938] A. C. 485, 490.

(2) [1938] Ch. 839.

(the example of Mellish L.J. in *Ancona v. Rogers* (1) later mentioned) a man's silver or gold plate which, having been "looted" by the Germans, was recaptured and then deposited by the conquering forces (themselves claiming no title to it) with a bank or other depositary upon terms comparable to those which I am assuming in the present case. Such examples, I am aware, may raise the further question of the extent to which the rule of immunity applies to chattels in the possession of a sovereign power but not used by it for public purposes.

Notwithstanding that question, the examples are useful. Under modern conditions, it may be natural to suppose that gold bars must be rightly held by governments rather than by individuals. The examples, therefore, bring into bolder relief the implications and consequences of the bank's claim if, notwithstanding the absence of any title, it is held to be well founded. Though the question is one of difficulty and complexity, and though we have been greatly assisted by the arguments and researches of learned counsel, no parallel case has been found, no case in which the claim of immunity has been raised by a party in a position comparable to that of the bank in this appeal. So to say is to cast no reflection on the propriety of the bank's contentions. The bank have, admittedly, in raising the plea of immunity, acted on the direction of the three governments; and the Solicitor-General has appeared in this court and in the court below on behalf of H.M. Government or on behalf of all three governments as *amicus curiae*.

But it is the case of the plaintiffs that the three governments are neither necessary nor proper parties to this action. That circumstance, to my mind, illustrates the point that there is a real distinction, as regards this matter of immunity, between actions in *rem* and actions in *personam*. At any rate, there is here presented for the first time the spectacle of a claim by an owner of property being not only resisted, but said to be incapable of litigation in our courts, by an English defendant who, being in actual custody of the goods claimed, sets up, not the title of his bailor, but some other right, said to be "possessory," although the defendant is in no sense the mere servant or agent (in the common meaning of the word) of that third party.

In his speech in *The Cristina* (2), Lord Maugham expressed his own caution in regard to the so-called doctrine of immunity.

(1) 1 Ex. D. 285.

(2) [1938] A. C. 485, 515.

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Thus, he said : " But it seems to me that the claim by the Spanish Government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions in rem against vessels belonging to a foreign government and employed in the ordinary operations of commerce. For my part I think such a claim ought to be scrutinized with the greatest care. In these days and in the present state of the world, diplomatic representations made to a good many States afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign government." Again (1) : " But there is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's rule he would in my opinion be bound to prove his title."

I venture respectfully to share Lord Maugham's misgivings ; and all the more since Mr. Cross's admission that his plea in the present case involved the result (which in my opinion Lord Maugham and also Lord Wright would have repudiated) that if a foreign sovereign " wrongfully obtained possession of valuable jewellery in this country and it were in the hands of a third person, he could claim to stay proceedings by the " rightful owner," not, it is true, by stating merely that he claimed it, but by the allegation (which could be sufficiently made on his behalf by the third person) that, as an ordinary bailor he retained " possession or control " of the jewellery within the meaning of Lord Atkin's formula.

As Lord Maugham himself observed, by reference to Brett L.J.'s well-known judgment in *The Parlement Belge* (2), the doctrine of immunity rests on the regal dignity of the sovereign, " his absolute independence of every superior " authority." It was also observed (passim) in the opinions of the House in *The Cristina* (3) that, though the doctrine of immunity must be regarded as part of our municipal law, it has become such on the footing that it has been reciprocally

(1) [1948] A. C. 517
 (2) 5 P. D. 197, 207.

(3) [1938] A. C. 485.

applied by other civilized nations. Thus, it is legitimate to approach the solution of the present case by asking, first, whether the regal dignity of foreign sovereigns is challenged by the plaintiffs' writ and, second, whether there is any evidence that a similar immunity to that asserted by the bank would be extended by the courts of France and America to the British Government. I am inclined to think that a negative answer to both questions should be given.

However that may be, it is clear that in this court the question has to be determined as a matter of authority by reference to Lord Atkin's propositions. The vital question then is: according to the proper acceptation of the language used by Lord Atkin, can these bars—and the same question can be asked of the picture or the plate in the hypothetical cases that I have given—be fairly regarded as being in either (a) the possession, or (b) the control of the three sovereign States?

Jenkins J. answered both questions in the affirmative. It is with great hesitation that I express a view differing from that entertained by him, and my difficulties have been enhanced by the realization that both my brethren in this court would, on the assumed facts, have reached the same conclusion as the judge below. But I have been unable to persuade myself that, on any significance of the word "possession" known to our law, and indeed any significance which I have been able to express or define, the three governments had or have, in the admitted absence of any title whatever, "possession" of the sixty-four bars claimed by the plaintiffs. And though I think, on the assumed facts, that the case for attributing "control" to the three governments is less difficult, I am inclined to a similar conclusion on this alternative also.

Before giving my reasons for the conclusion to which I have felt compelled, I would like to deal (if, as I hope, I can) with one point which was pressed on us, and which has commended itself to my brethren. It is said that, immediately before the deposit of the bars in question, they were indubitably in the "possession," that is the actual or de facto possession, of the three governments or one of them; for they were in the hands either of the American Military Forces or of the Tripartite Commission, and these persons were the mere servants or agents of the United States Government or of the three governments. So far I agree. Any claim, therefore, by the plaintiffs to the bars against the United States Army Authorities or

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the commission must have been liable to be stayed as impleading directly or indirectly the sovereigns concerned. Again I agree. It is then said that, assuming immunity at that stage, to suppose the immunity to be lost as a result of doing the very thing which (having regard to the character of the property in question) it would be the normal and natural thing to do, namely, deposit it with a bank, is, on the face of it, contrary to common sense and is to introduce unnatural and unnecessary refinements into our law.

In my judgment, this reasoning either involves a confusion of title or proprietorship with possession, or loses sight of the basis on which rests the doctrine itself. If, immediately before the deposit, the United States Army or the commission held the bars "in right of conquest," then, I agree, that right should not reasonably be treated as lost by the mere act of deposit; but the argument, in my view, forgets that the phrase "right of conquest" involves some significance of title or ownership. On this application, it is conceded that the three governments assert no title at all: they are in the position of mere finders of another's property.

Secondly, the non-availability of process against the United States Army Forces or the commission, as the case may be, would surely rest on the circumstance that by such process the sovereigns would themselves be directly or indirectly impleaded. Nor am I persuaded on other grounds that the result would be to draw fine distinctions. In the case of any doctrine which has definable limits, the case must sooner or later be found which is near the boundary line. It will be none the worse for that, so long as the question on which side of the line it falls can be answered by reference to logic or principle. If I, a foreign sovereign, find the valuable (and identifiable) property of an English citizen, I may, so long as it remains physically in the hands of myself or one of my servants, successfully challenge the owner's right to sue, on the ground that my regal dignity is offended. But if I choose to part with the possession of the property to some third party, who is neither my servant nor (in the ordinary sense of the term) my agent, it does not seem to be unreasonable to say that I have thereby lost my immunity.

It is conceded in the present case that the bank are not the "servant" of the three governments, or any of them. At the time of the deposit of the bars, and assuming, as for present purposes I do, that the bars are still specifically allocated to

the original contract of deposit, the position of the bank is admittedly that of a bailee. It is unnecessary now to consider any special rights the bank might have by way of lien in respect of their unpaid charges or otherwise ; for Sir Andrew Clark has not in this court based argument on them. Nor, though he has kept the point open, has he in this court addressed any argument on the point that the bars are expressed to be held for H.M. Treasury, albeit on account of the three sovereign States.

The bailment with the bank was a bailment for reward, and must for present purposes be regarded as a revocable bailment. Physically, beyond doubt, the bars as a consequence are in the possession (and also under the control) of the bank. It is, however, said—and this is the turning point in the case—that the bars nevertheless remain either in the possession or under the control of the bailors in some sense, and (more particularly) in the sense used by Lord Atkin.

As regards “possession,” the judge in the court below based himself on the decision of this court in *Ancona v. Rogers* (1) ; and Sir Andrew Clark was, in my judgment, right in saying that this part of the judge’s judgment was its “lynch-pin.” We have been referred to many passages in Pollock and Wright on Possession in the Common Law, Halsbury’s Laws of England and other text-books, and there is no doubt that, on certain conditions, a bailor will be regarded as having “possession” of the goods bailed by him, that is, for the purposes of maintaining an action for trespass. But in my opinion the conditions are that the bailor either owns the goods, or has some right or title thereto which he can (and must) allege against the third party. This follows, in my opinion, from the history of the bailor’s right to sue in trespass, which is discussed in Sir William Holdsworth’s History of English Law, vol. III, p. 348, and vol. VII, pp. 422, 430 ; and I think that it is also inherent in the notes in Bullen & Leake, (3rd ed.), p. 414 : see also Pollock and Wright, on Possession in the Common Law, p. 145, where it is stated that “possession” in such a case means a right to possession which is “one of the constituent elements of the complete “right of property.”

In *Ancona v. Rogers* (1) there was no doubt that the bailor was the proprietor of the furniture in suit, and the language

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(1) 1 Ex. D. 285.

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of Mellish L.J. cited by Jenkins J. (1) must, in my judgment, be read in the light of that fact. The vital passage in the judgment of Jenkins J. appealed against is as follows (2):
 “Setting aside as without relevance here cases of palpably unlawful possession, as of stolen goods deposited by the thief with a receiver, I fail to see how the question whether goods remain in point of law in the possession of a bailor after he has delivered them to a bailee for safe custody can be made to depend on whether the title under which the bailor was in possession of them at the time of such delivery is or is not claimed by some third party to be invalid.” It is at this point in his judgment that, with all respect, I part company with the judge: in my judgment, there is neither logic nor authority for the view that a bailor, who can and does assert no title of any kind to the goods bailed (that is, a thief or mere finder,) may bring an action for trespass against a third party who either has acquired physical possession of the goods, or threatens so to do, or who claims the goods as his own.

In the result, therefore, it seems to me that the three governments cannot claim to have either physical possession (for that is plainly in the bank) or legal possession in any definable sense, of the bars. Then what sort of possession is it that they are said to have? It is claimed that Lord Atkin did not use the word “possession” in any strict sense, or by reference to the significance given to the word by English law. In what sense, then, did he use it? I think for my part that he meant “de facto possession.”

In *The Cristina* (3) the Spanish Republican Government were held by all their Lordships to have de facto possession of the ship, because the master and crew, who were in fact in actual control and charge of the ship (as a driver and his mate would be in actual control or charge of a steam or motor vehicle on land) asserted they so “held” the ship as servants or agents on behalf of the Spanish Government. In the case of a ship such de facto possession via the master and crew is plainly intelligible—by no other means can there be de facto possession at all. But in my judgment there is no analogy between such a case and a contract of bailment of chattels with a bank. Each, of its own kind, is a well-understood relationship. The doctrine of immunity is, after all, a legal doctrine, and must be capable of being understood and

(1) [1949] Ch. 369, 387.

(3) [1938] A. C. 485.

(2) Ibid. 388.

expressed by lawyers. The "possession" of the *Cristina* by the Spanish Republican Government was a result understood by and having a meaning to lawyers from the facts of that case. If I am right in my view that, vis-à-vis the plaintiffs, the three governments were not in any sense in legal possession of the sixty-four bars and had no right in law to such possession, then I cannot see that, in any proper sense of the word, they can be said to have been "in possession" of them at all. Nor, in my judgment, is the bank's claim assisted by reference to the *Arantzazu* case (1), for there, not only did the master and crew assert that they were in possession of the ship on behalf of the Spanish Nationalist Government, but the owners of the ship assented to that view.

It was argued by Mr. Cross that, as between the bank and the three governments, the bank were bound to admit the rights of the latter—not only, indeed, their right to call for possession of the bars, but also their title. But, assuming that this is so, the circumstance seems to me to be irrelevant in an action in personam by the plaintiffs against the bank. If the plaintiffs, claiming no title to them, had by some means acquired actual possession of the bars, and were sued in trespass by the bank, the terms and consequences of the contract between the bank and the three governments would be wholly irrelevant to the plaintiffs' defence, and to any damages which they might have to pay: see for example *The Winkfield* (2). Equally, in my view, where the plaintiffs sue the bank for delivery of the bars, the terms and consequences of the banks' contract with the three governments are irrelevant. In the absence of some title, the plaintiffs would fail: proving a title, the plaintiffs ought (if they can litigate) to succeed unless the bank can prove a better title in themselves or can set up a better title in those who deposited the bars with the bank.

It is in this respect that, as I think, the difference to which I have alluded between an action in rem and an action in personam is important. In the former case, if a plaintiff establishes a right or title to the chattels in suit, the right or title is good against (and pro tanto defeats) the claims of all other persons interested, whether parties joining in the proceedings or not. In the present case (if it was an action in rem) the establishment of the plaintiffs' title would be good against

(1) [1939] P. 37; [1939] A. C. (2) [1902] P. 42.

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the three governments and defeat any claim they might have to the chattels both against the plaintiffs and the bank. The present proceedings are, however, proceedings in personam only. If the plaintiffs succeed against the bank, the three governments might still be entitled to recover the bars from the plaintiffs if they could show a higher title, and might also have claims against the bank, the validity of which it is unnecessary now to consider. It is true that the three governments may, as a consequence, be compelled to resort to the courts to assert their rights, and recover any property or money to which they may be entitled. But it is no part of the law of immunity as applied in this country that the courts will restrain all proceedings merely on the ground that the result might be to compel a sovereign claimant to sue for his rights : see per Lord Maugham in *The Cristina* (1). A third party in the position of the bank in the present case, being advised in regard to deposited chattels that the title of the claiming owner was a good one, and obtaining his authority to rely upon such title, might properly and legitimately elect to deny all rights of the depositor ; and such a third party could not, I conceive, be prevented from so doing by the circumstance that the depositor was a foreign sovereign who was thereby compelled to litigate his claim.

Even in the case of actions in rem, no instance has been found in which the ship, being in the actual possession of a third party—for example, a ship repairer—a claim by the owners has been stayed on the application of the third party and in the absence of the foreign sovereign, because the third party asserted some right, proprietary, possessory, or other, in the sovereign. In the case of the *Amazon* (2), the vessel was in fact in the physical custody of such a third party, Thorneycrofts. But the claim to immunity was set up by the plaintiff's husband, a foreign diplomat, claiming immunity as such ; and the ship was registered in his name, so that both the plaintiff and her husband asserted that the possession of the vessel was, in law, his.

We were referred to the American case of *Long v. The Tampico* (3). That was a claim for salvage in respect of work done to the ship whilst in charge of a captain to whom it had been delivered by one, Obregon, for navigation to Vera Cruz, there to be handed over for public use to the Mexican

(1) [1938] A. C. 485, 516, 517.

(3) 16 Federal Reporter 491.

(2) [1939] P. 322 ; [1940] P. 40.

Government. It was held by the District Court that (on the assumption that Obregon was the Mexican Government's agent in handing over the ship to the captain) the captain not being the servant of the Mexican state but a bailee, and the ship being in his possession as such, no doctrine of immunity applied to stay the proceedings. It is true, as Jenkins J. observed, that the case is of no binding authority in our courts. But it appears to be still treated as good law in America: see *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar* (1). It seems at least to show that the claim to immunity made on behalf of the United States in the present case cannot rest (as it should) on any reciprocity in the American courts. There is no evidence before the court of the view and practice of the French courts as regards the rule of immunity. I have therefore been unable to satisfy myself that the bars in suit can be said to be in the "possession" of the three governments, as that word is used by Lord Atkin in *The Cristina* (2), or in any sense of that word that I am able to express or define.

There remains the question—were the bars in "the control" (within Lord Atkin's formula) of the three governments? On this matter it is, I think, much more difficult to express a conclusion on an artificial and assumed basis of fact; for the answer to the question in any given case depends essentially upon its exact and particular facts. But assuming always that the bars remain segregated to the commission's contract and that by that contract the commission can at any time require the bank to deliver the same bars to such persons as it may direct, still, on a matter of principle and of ordinary English, I am disposed to think the bars were not in the control of the three governments.

The judge below devoted the main part of his judgment to the matter of "possession," and he dealt briefly with "control." But he was of opinion that, since the three governments, or the commission on their behalf, could at any time direct the bank to deliver the bars to them, it therefore followed that they were in their "control." But it seems to me that, until such a direction is given and has been complied with, the "control" of the bars was and is with the bank; for it rests entirely with the bank where the bars should from time to time be placed and who should be in charge of them on the

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(1) (1938) 303 U. S. 68.

(2) [1938] A. C. 485.

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bank's behalf. On such matters the commission have no knowledge and no concern: they are plainly not entitled to give to the bank any orders or in any way to dictate to them how the latter shall discharge their duties as bailees. To take a different view is, to my mind, to confuse "control" with "right to call for delivery"—which, on my understanding of the word, it certainly is not. I refer to the definition of "delivery by way of bailment" in Pollock and Wright on Possession in the Common Law, p. 131: "a delivery of "a thing by a possessor (otherwise than in case of alienation) "with intent to transfer separate undivided and exclusive "control for the time being upon a condition or trust . . . "is a bailment."

Lord Wright in *The Cristina* (1) spoke of the rights on which the sovereign might rely to support the claim to immunity as comprehending rights "lesser than" proprietary or possessory. If his words could be said to mean and include merely contractual rights, as between a bailor and bailee, to call for the return of goods deposited, it seems to me that they went beyond the requirements of the decision in *The Cristina* (2) and find no support in the opinions of the other noble Lords. But in my view the words were used in reference to the facts of that particular case and to the somewhat special "rights" which flow from such an act of state as the "requisitioning" of ships. It appears, I think, from Lord Wright's later language on the same page that what he had in mind was the consequence of such a requisitioning which gives to the sovereign state the practical right to day-to-day direction of the movements and functions of the ship, whatever might be in law its (strictly) proprietary or possessory interests. I think that the same construction must be given to Lord Atkin's formula "possession or control." And I further venture to think that, whatever were the "rights" of the commission vis-à-vis the bank, they are in no way comparable.

I have expressed my opinion on the assumption that the bars were and are segregated to the commission's contract because of the importance of the questions raised, and because of the possibility of their arising again, in one form or another, under modern conditions. Sharing Lord Maugham's misgivings, I think that the extent of the rule of immunity should be jealously watched.

(1) [1938] A. C. 485, 507.

(2) Ibid. 485.

But, as I have stated at the beginning of this judgment, on the facts as they have emerged, I am satisfied that the bank have failed to make good a case for a stay of the plaintiffs' action. I think, therefore, that the appeal should be allowed and that the bank's motion for a stay ought to be refused. I further think it to follow that the plaintiffs are on their motion entitled to an injunction until judgment in the action or further order as regards the fifty-one bars remaining unsold.

In conclusion : (1.) had the plaintiffs failed to show that they were entitled to pursue a claim for the return of any bars and, consequentially, for an injunction in respect of them, I agree with Jenkins J. and Somervell L.J., and for their reasons that they would also be disentitled to proceed with a claim for damages for detinue or conversion of the same bars. (2.) As regards the so-called "trust cases," I also entirely agree with the view taken in regard to them as regards the present case by the judge, to which I only add that I feel some doubt whether *Gladstone v. Musurus Bey* (1) would today be decided in the same way as it was decided by Page-Wood V.-C. in 1862.

SOMERVELL L.J. The facts as admitted or proved before the judge are fully set out in his judgment, and it is unnecessary to recapitulate them in detail. In view of the line taken by the foreign governments that they do not rely in these proceedings on any title, proprietary or possessory, but only on their de facto possession and the terms of the deposit of the bars with the defendant bank, many of the documents, though matters of history, do not affect this decision. We are, for example, not concerned with the question whether these bars were or were not monetary or non-monetary gold within the Tripartite Agreements; nor with the question whether the three governments acquired rights proprietary or possessory by reason of the circumstances in which they obtained de facto possession. Sir Andrew Clark, on behalf of the plaintiffs, admits, as is clearly the fact, that the three governments had de facto possession of the bars before their deposit with the bank.

The case before the judge proceeded on the basis that, as stated in the affidavit of an assistant chief cashier of the Bank of England, the sixty-four bars of gold referred to in the writ

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(1) 1 H. & M. 495.

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had been deposited with the bank for safe custody and were returnable in specie by the bank to the three governments on demand. The question was whether on this basis the foreign governments were within the principles of English law with regard to state immunity and could through the bank successfully apply to have the proceedings stayed.

Although I think that the appeal must be allowed on the further evidence before us, I will state briefly my reasons for agreeing with the judge's conclusions on the facts before him. The applicable principles of law are set out in *Compania Naviera Vascongado v. S. S. Cristina* (1). I need not read again the two propositions as stated by Lord Atkin. The remainder of Lord Atkin's speech and the other opinions make certain further points clear. It is plain that de facto possession is sufficient. Lord Atkin says expressly that it is unnecessary to decide whether the ship was rightly in the possession of the Spanish Government. Three of their Lordships were of opinion that the writ in rem directly impleaded the Spanish Government (Lord Atkin (2), Lord Thankerton (3), and Lord Wright (4)). All their Lordships also decided that the arrest infringed the second principle, the ship being, it was held, in the actual possession of the foreign government. Lord Atkin clearly regarded control as something beyond actual possession (5). "It is," he says, "well established that the court will not "arrest a ship, which is under the control of a sovereign by "reason of requisition. The *Broadmayne* (6), *The Messicano* " (7) *The Crimdon* (8). But the present case is not one of "control but of actual possession for public purposes." Lord Wright says that the rule (9), "applies to cases where what "the government has is a lesser interest, which may be not "merely not proprietary but not even possessory. Thus it "has been applied to vessels requisitioned by a government, "where in consequence of the requisition, the vessel, whether "or not it is in the possession of the foreign state, is subject "to its direction and employed under its orders."

I will consider first the claim for delivery up of the gold bars, and the injunction. The first and main point is, as I see it, a very short one: did these gold bars cease to be in control

(1) [1938] A. C. 485.

(2) Ibid. 485, 491.

(3) Ibid. 493.

(4) Ibid. 505.

(5) Ibid. 492.

(6) [1916] P. 64.

(7) [1916] 32 T. L. R. 519.

(8) [1900] P. 171.

(9) [1938] A. C. 485, 507.

of the three governments when deposited with the defendant bank? I am assuming, as I have said, that the bars were held by the bank for the three governments so that, through the agreed machinery of the Tripartite Commission, the bank would on demand deliver the bars in accordance with any instructions which they might so receive. I would have said that the three governments retained control. Some meaning must be given to the word "control." Some person other than the foreign government has *ex hypothesi* possession and that measure of control which goes with possession. Control would therefore, as it seems to me, cover the right to tell the possessor what is to be done with the property. I can also see no logic in holding that the immunity is lost by a temporary bailment of property for, as here, safe custody or possibly for some other temporary purpose. Suppose that the *Cristina*, having been in the *de facto* possession of the Spanish Government, had been at the date of the arrest temporarily bailed to a ship repairer for minor repairs, it being clear that she was being repaired under the instructions of the Spanish Government in order to enable them to use her for the public purposes for which they had taken possession: I think that it would be wrong to say that in those circumstances the control required by the principle had been lost.

A good deal of the argument turned on whether "possession" was to be given its meaning in English law. This point does not, I think, arise, and I express no opinion on it. Perhaps, however, I ought to add this: the House of Lords were clearly not considering the problem which confronts us. If I am wrong in holding that control as used in the opinions in that case covers the present case, I would still have been inclined to dismiss the appeal. I agree with Sir Andrew Clark's submission that the principle of immunity ought not to be extended in the absence of evidence that the extension has been generally accepted by civilized nations as a rule of international conduct. If I regarded the dismissal of the appeal as an extension of the rule, I would agree entirely. One is however, in my opinion, not necessarily extending a rule, in this sense, if its application to circumstances which were clearly not present to the minds of those whose formulation of the rule one is considering involves the addition of a gloss. If, contrary to the view which I have formed, such a gloss is necessary, I should regard it not as an extension of the rule,

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but as its logical application to circumstances not then before the House.

We were referred to *Long v. S.S. Tampico* (1), as showing that under this rule of international law as applied in the United States, the immunity is lost if the property in question is in the hands of a bailee. In order to understand *The Tampico* (1) it is necessary to consider an earlier case, *The Davis* (2). That case concerned a lien for salvage of property of the United States Government. Miller J., who delivered the opinion of the Supreme Court of the United States, said "that such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring a suit against the United States, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done." It was also said that no suit in rem can be maintained against the property of the United States, when it would be necessary to take such property out of the possession of the government by any writ or process of the court. At the time of the salvage service the goods in question were being carried on a ship and were arrested on arrival before they had been handed over to an agent of the government. The court held that the possession of the master was not the possession of the United States. The court negatived the view that no suit in rem can be instituted against property of the United States in any circumstances. As the Marshal served his writ and obtained possession without interfering with that of any officer or agent of the government, the lien was held to be enforceable against the property.

In *The Tampico* (1) the rule as to state immunity was based on a principle which, so far as I know, has never been its basis here and, if applied today, having regard to the Crown Proceedings Act, 1947, would abolish the rule altogether. It is stated in these words (3): "By international comity, and that tacit agreement which constitutes the law of nations, every government accords to every other friendly power, the same respect to its dignity and sovereignty and the same consequent immunity from suit, both as respects the person of the sovereign as well as the national property devoted to

(1) 16 Federal Reporter 491.

(3) 16 Federal Reporter 491,

(2) 10 Wallace 15, 19.

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“the public service, which it enjoys itself within its own dominions.”

The case concerned claims for salvage services said to have been rendered on August 8, 1880, to two vessels which had admittedly been built and were designed for the Mexican Government. Objection was taken on behalf of that government that the vessels were exempt from the jurisdiction of the court. The court was of opinion that, on the evidence, the vessels at the time of the salvage service neither formed part of the public service of Mexico nor were as yet the property or in the possession of that government. This turned on the view that the possession of one Obregon, to whom the vessels had been delivered on August 6 or 7, could not be treated as the possession of the Mexican Government. The court, however, proceeded to consider the position if this were wrong, and the Mexican Government had obtained possession on August 6 or 7. Before the services were rendered on August 8, the two vessels had been delivered by Obregon to two captains respectively as bailees by whom they were to be delivered to the Mexican Government at Vera Cruz. The court regarded the case on this view of the law and the facts as covered by *The Davis* (1), and the arrest, having been made without invading the possession of the Mexican Government, must stand.

In *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar* (2), a decision, like *The Davis* (1), of the Supreme Court, *Long v. The Tampico* (3) is cited with approval.

Although the rule as to immunity as applied in any one state is based on a similar rule being applied in other states, it would be impossible to expect absolute uniformity. If the United States had been the only government objecting to the present proceedings, I can imagine a formidable argument being addressed to us on the lines that a state was not in a position to claim an immunity which it did not itself grant, and that *The Tampico* (3) showed that the present proceedings would be regarded as falling outside the rule. We are, however, concerned with the objection of the French Government. If I am right in my application of the rule as formulated by the House of Lords in *The Cristina* (4), I think that it would be wrong to modify that rule as against the French

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(1) 10 Wallace 15.

(2) 303 U. S. 68.

(3) 16 Federal Reporter 491.

(4) [1938] A. C. 485.

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Government, even if I were satisfied that, under the rule as applied in the United States, the present proceedings would not be stayed.

Although the point was not taken in these proceedings, there is something to be said for the view that, where a foreign government seeks to stay proceedings, the court should be satisfied by evidence that the law of that country grants immunity on the basis that is being sought here.

Before going on to consider the effect of the further information supplied by the bank, I will state my opinion on an alternative submission of Sir Andrew Clark. He offered to abandon his claim for delivery up of the bars and for the injunction, claiming only damages for conversion. On the basis that the bars were being held as bars for the foreign governments, and the conversion relied on was the refusal to deliver them up, this argument did not commend itself to me. To say in effect: we will not order your agent or bailee to deliver up your property, but will make him pay damages for not doing that which we are disclaiming any right to make him do, would appear to me to be an impossible proposal.

I agree with the judge that the cases concerning the administration of trust property in which a foreign government may be included among the persons interested have no application to the facts of the present case. I also agree with him that the suggestion that the principle of immunity is limited to cases where either a foreign sovereign is impleaded or relief in rem is sought is inconsistent with authority and with the language used in *The Cristina* (1) and *Haile Selassie v. Cable & Wireless, Ltd.* (2).

I thought at one time that the present procedure, by which the objection was taken by the bank, and not by an application made by the foreign government, was unsatisfactory. Provided, however, that there is, as here, clearly evidence from the foreign governments that the rights of immunity are claimed, and counsel for the defendant is instructed to argue the point, I think that there is no substance in the objection.

It may be said that the above issues no longer arise having regard to the conclusion to which I have come on the new evidence before us. I have, however, thought it right to express my opinion, because I am at any rate doubtful whether

(1) [1938] A. C. 485.

(2) [1938] Ch. 839.

I should have come to the same conclusion as the learned judge on "possession."

I will now pass to the further developments that took place before us. Sir Andrew Clark put in some further correspondence as indicating that the bank did not hold specific bars as deposited for the governments, but credited them with so many fine ounces of gold, undertaking to deliver not any specific bars but so many ounces of gold. There was then filed an affidavit by one Menzies, an acting deputy chief cashier of the bank. This affidavit set out the practice of the bank since 1940. From that date individual bars of gold had not been set aside and kept for individual customers. The various bars deposited in most cases, if not all, by other central banks, were kept separate from the bank's gold. Bars were examined on deposit, their gold content ascertained, and in certain cases where necessary they were made up to a standard. The customer was credited with the gold content, and thereafter the bars ceased to be held separately for that particular customer.

There were further statements in the affidavit, and correspondence was put in to show that these sixty-four bars in question had been set aside, and were held specifically for the three governments.

At this stage of the proceedings this seemed an answer to Sir Andrew Clark's point on the further correspondence. If the bars had passed into what I will call the customers' pool of gold, the case would in my opinion have fallen outside the principles as laid down in *The Cristina* (1). I do not see how it could be said that the three governments had in that case any control of the sixty-four bars. They had, what would in ordinary circumstances be just as valuable, a right to the delivery of an equivalent amount of gold.

At the conclusion of the argument we were informed by counsel for the bank that further investigations had shown that one or more bars had in fact been inadvertently parted with, and the hearing was adjourned in order to enable the full facts to be placed before the court. A further affidavit was sworn by Menzies, and the following summarizes the relevant facts: as I have stated, the ordinary practice of the bank was not to hold specific bars for individual customers. The bank by letter dated October 25, 1948, to the Tripartite

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Commission stated that these bars had been temporarily segregated pending the receipt of instructions as to their disposal. There is no doubt that this had physically been done. There was a separate stack of these bars and a warning notice was placed on them. Particulars as to gold bars deposited are placed on cards, which constitute the records of the bullion office. I read Menzies' affidavit as meaning that, if segregation of particular bars to be held for a particular customer is to be effective, a warning note must be made on the cards which relate to the bars in question. This was not done, with the result that between December 30, 1948, and January 26, 1949, thirteen of these sixty-four bars were sold, have been used in manufacture, and no longer remain in their original state.

The conclusion seems to me to be clear: the authorities of the bank responsible for the correspondence with the Tripartite Commission intended that these bars should be kept apart from the pool and held as individual bars for the three governments. Some steps were taken to this end, but, as the facts show and as is admitted, one necessary step was not taken. The sixty-four bars for all relevant purposes at all material dates were in the pool. Thirteen of them were disposed of, and the whole sixty-four might have been disposed of without instructions from or reference to the Tripartite Commission. In these circumstances it seems to me impossible to hold that these sixty-four bars were in the possession or control of the three governments. In any case of bailment, where goods, say furniture, are being held for a particular customer, there is of course always the possibility of a mistake: a chair may inadvertently be delivered to the wrong person. That is a wholly different case. Here, admittedly under the ordinary practice of the bank, the bars passed into the pool and out of the possession and control of the bailor. The bank intended that they should be kept apart from the pool but failed to take the necessary steps to achieve this result.

In my opinion, therefore, the whole basis of the argument for staying the proceedings goes as to all the sixty-four bars. If I am wrong about this, then it was, I think, conceded that the action must proceed as to the thirteen bars. An answer based on the fact that the bars were sold after the issue of the writ would not be an argument available, as I think, on the present issue, namely, whether these proceedings should be

stayed. The bank, as one would expect, did not require the issue of a fresh writ in order to get over the possible argument based on this point.

I agree that this appeal should be allowed on the terms stated by the Master of the Rolls.

COHEN L.J., stated the facts and continued: Since the original hearing of the appeal, further material facts have been brought to the attention of the court. It is now known that the bank have sold or disposed of thirteen out of the sixty-four bars, conduct which could only be justified if the gold bars had been merged in the general pool of customers' gold and the right of the governments were limited to the receipt of the appropriate amount of fine gold. The effect of the evidence has been stated by my brethren, and I need not repeat what they said. As regards the thirteen bars which have been sold, I incline to agree with Sir Andrew Clark that he would be entitled to proceed with his action as it stands so far as the claim for conversion is concerned, since the cloak of immunity which might have been a bar to the prosecution of the action was destroyed when the thirteen bars ceased to be identifiable; but it is unnecessary to express a concluded opinion on this point, since Mr. Cross for the bank agreed that if Sir Andrew Clark founded his claim in conversion on the dealings by the bank with the thirteen bars in December, 1948, and January, 1949, the bank would not take the objection that the dealings were subsequent to the issue of the writ.

As regards the remaining fifty-one bars, I agree with my brethren in their conclusion that the whole basis of the argument for staying the proceedings has gone, and with the reasons which they give, based on the additional evidence, for reaching this conclusion. I do not desire to add anything further on this point.

In these circumstances, it is not strictly necessary to go into the issues that were decided in the court below, but, since the matter was fully argued and the facts on which I have based my conclusion were not before the judge, I think it right that I should state shortly my opinion on the main point with which he dealt.

I must refer briefly to *The Cristina* (1). The claim in that case related to a ship which the Spanish Government claimed

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to be in their possession. It was held "that the courts of this country will not allow the arrest of a ship, including a trading ship, which is in the possession of, and which has been requisitioned for public purposes by a foreign sovereign state, inasmuch as to do so would be an infraction of the rule well established in international law that a sovereign state cannot, directly or indirectly, be impleaded without its consent, and, therefore, that the writ and all subsequent proceedings must be set aside." Lord Atkin began his speech in that case by laying down two propositions of international law which in his view were engrafted into our domestic law and were well established and beyond dispute. These propositions have already been read. They were, I think, accepted by all the other noble Lords, with the reservation that Lord Maugham was of opinion that the second principle should not be extended to property only used for the commercial purposes of the sovereign, and Lords Thankerton and Macmillan reserved this question for future consideration.

It is also to be observed that both Lord Atkin (1) and Lord Wright (2) considered that *de facto* possession brought the principle into operation notwithstanding that such possession was wrongfully obtained. Lord Wright says (3): "This," the independent status in international law of a foreign sovereign, "gives the sovereign, so far as concerns Courts of Law, an immunity even in respect of conduct in breach of the municipal law." In calling attention to these passages, I am not, of course, suggesting that the possession of the governments in the present case was necessarily wrongful. That point was not argued before us, and it may well be that their possession, having been obtained in the way I have indicated, was not wrongful.

Sir Andrew Clark accepted, as he was bound to do, the two propositions laid down by Lord Atkin—indeed he said that they were exhaustive; but he contended that they did not touch the present case, the first because the action in the present case was in *personam* and not in *rem* and the sovereign states were not necessary parties to the action; the second because, for the purposes of the present interlocutory appeal only, it was agreed that the sovereign states were to be treated as not being owners or claiming ownership of the gold bars,

(1) [1938] A. C. 493,

(3) *Ibid.* 485, 509.

(2) *Ibid.* 500.

and, as he said, they were neither in possession or control of them.

Mr. Cross did not press the point that the action impleaded the foreign states. Directly they were certainly not impleaded: a judgment in the plaintiffs' favour would not bind them as would a judgment in rem. I think, therefore, that it is not strictly true to say that the writ in this action impleads the sovereign states; but this would not help Sir Andrew Clark unless he could satisfy us that, if we allow the action to proceed, we could do so without, by our process, seizing or detaining property which is in the possession or control of the sovereign states.

On this point, Sir Andrew Clark's argument was divided into two parts: (a) he said that no such interference could be involved since the bars were not in the possession or control of the sovereign states; (b) he said that, even if they were in that possession or control, the award of damages would not involve interference with it.

As regards (a) he advanced the following propositions: (1.) possession means possession in law; (2.) possession in law is one and indivisible; (3.) under a contract of bailment the possession is in the bailee and the bailor therefore cannot have any possessory rights; (4.) the fact that a bailor who is the true owner of goods may be able to sue in conversion is immaterial, because his right so to do depends on his ownership, and on this application the sovereign states do not claim to be owners of the gold bars; and (5.) the sovereign states cannot be in control of the gold bars, since a chattel differs from a ship and there cannot be control of a chattel apart from possession or custody.

With the first, second and fourth propositions I find myself in agreement, but I cannot accept the fifth. I can see no reason in principle why Lord Atkin's second proposition should not extend to personal chattels. I think it clear from the observations of Lord Wright (1), that, while he recognized that ships had certain peculiar qualities, the propositions laid down by Lord Atkin were of general application. Lord Maugham seems to have been of the same opinion, for he said (2) that the claim to immunity in that case might "extend to . . . ships or other chattels . . . seized in this country" "without any shadow of right." Indeed the whole tenor of

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(1) [1938] A. C. 485, 508, 509.

(2) Ibid. 515.

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his speech is directed to chattels generally, and not merely to ships.

The bank would therefore be entitled to succeed if they could satisfy us that the gold bars in question were in the possession or control of the sovereign states. For the reasons given by my brother Somervell, I think it plain that the bars were under the control of the three governments within the meaning of Lord Atkin's second proposition and I agree with my brother in thinking that, but for the new evidence to which I have referred, if we were to allow this action to proceed on the evidence originally before us, we should by our process be interfering with that control. Having reached this conclusion, I find it unnecessary to consider Sir Andrew Clark's third proposition, or to decide whether the bars were or were not in the possession of the governments after they had been deposited with the bank.

A number of other authorities were cited to us, but, in view of the conclusion to which we have been forced by the additional evidence, I do not propose to review them. I only desire to express my concurrence with the conclusions reached by my brother Somervell on the American cases. I also agree with him that, had we refused to allow the case to proceed in detinue, it would, for the reasons which he gives, have been wrong to allow it to proceed in conversion. Accordingly, had it not been for the additional evidence as to the dealings by the bank with the bars, I should have been of opinion that the appeal failed ; but, for the reasons I have given, based on the additional evidence, I agree that it must be allowed.

Before parting with the case, I desire to express my concurrence with the tentative opinion expressed by my brother Somervell that immunity could not be claimed by a sovereign state which did not itself accord immunity in similar circumstances to other sovereign states.

Appeal allowed.

Leave to appeal to the House of Lords.

Solicitors : *Slaughter & May ; Freshfields ; Treasury Solicitor.*

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National Health Service—Vesting of voluntary hospitals in Minister of Health—Premises and endowment held for hospital purposes at vesting date—Trustees authorized by trust deeds to divert premises and endowment to other charitable purposes—Whether premises and endowments “held solely for the purposes” of the hospital—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), s. 6, sub-ss. 1, 2; s. 7, sub-ss. 4, 9 (a), 10.

In considering the question whether the premises or endowments of a voluntary hospital are “interests held by trustees solely “for the purposes of that hospital” within the meaning of s. 6, sub-s. 1, or s. 7, sub-s. 4, of the National Health Service Act, 1946, and accordingly vest in the Minister of Health on the appointed day, regard must be had solely to the purposes for which the premises or endowments were in fact held immediately before the appointed day. The fact that the trustees of the hospital have the power or right, under the relevant trust deeds, to divert the premises or endowments to other purposes, is immaterial.

Observations on the right method of approach to the construction of the vesting sections of the Act.

ACTION.

By a conveyance made on February 5, 1924, the Urban District Council of Wellington, Somerset, conveyed to trustees (including the defendants) a piece of land situated in Wellington. The conveyance contained the following provisions: “1. . . . the council as beneficial owners hereby “convey to the trustees [the piece of land] . . . (a) upon “trust that the said premises shall form the site for and “that there shall forthwith be erected thereon a maternity “home. (b) The trustees shall have the entire and absolute “control of the said land and the buildings for the time being “thereon 2. It shall be lawful for the trustees “from time to time to build upon let mortgage sell pull down “rebuild and alter or otherwise deal with the said premises “in such manner in all respects as the trustees shall think “fit 3. The trustees shall apply and deal with all “moneys which shall arise from any sale mortgage or other “disposition of the said premises either for the general pur- “poses of the maternity home aforesaid or for such other “public charitable purpose and in such manner as the trustees “shall think fit 4. The trustees hereby covenant “with the council (b) that one house only shall be

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“erected on the said site and used for a maternity home or “a private dwelling-house.” By a further conveyance made on May 4, 1926, the council conveyed an adjoining piece of land to the trustees on similar terms for use in connexion with the maternity home.

A trust deed was made on September 9, 1926, between the first defendant and another as settlors and the defendants and others as trustees containing the following provisions: “Whereas this deed is supplemental to [the “conveyances referred to above] . . . and whereas the “settlors are desirous of endowing the said maternity home in “manner hereinafter appearing and with that object have “transferred into the names of the trustees [certain investments] now this deed witnesseth as follows . . . 2. The “trustees shall stand possessed of the said shares and the “investments for the time being representing the same (hereinafter called the endowment) upon trust that the annual “income thereof shall be applied in the manner hereinafter “appearing. 3. The trustees shall out of the income of the “endowment in the first place defray the cost of maintaining “the structure and interior of the said maternity home . . . in “good condition and repair . . . and all proper costs “charges and expenses of and incidental to the administration “and management of the house and the endowment. 4. After “the satisfaction of such payments the trustees shall invest “the surplus income . . . in such investments as are “permitted by law for the investment of trust funds . . . 7. The trustees shall if they think fit sell the said shares “or other the investments for the time being representing “the endowment and apply the proceeds of such sale for such “other charitable trust and in such manner as they shall “think fit.”

A maternity home was erected in 1925 on the premises conveyed, and had ever since been carried on as such. The plaintiff, the Minister of Health, alleged that immediately before July 5, 1948 (the date on which voluntary hospitals vested in the Minister by virtue of the Act of 1946) the defendants held the premises and the endowment solely for the purposes of the home, and claimed a declaration that the interests, rights and liabilities so vested in the defendants, and the endowment, were transferred to and vested in the Minister under s. 6, sub-s. 1., and s. 7, sub-s. 4 of the Act on

that date (1). The defendants (the surviving trustees) alleged that immediately before that date the premises and endowment were vested in them on the trusts of the respective trust instruments, and that accordingly the premises and endowment were not then held solely for the purposes of the maternity home, and so did not vest in the Minister. They counterclaimed for declarations accordingly.

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Sir Hartley Shawcross A.-G., Colin Pearson K.C. and Gumbel for the Minister. The issue here is whether the Act operates to transfer to the Minister on the appointed day (July 5, 1948) all interests which de facto were being used for hospital purposes or whether a de jure right (though unexercised) to use

(1) National Health Service Act, 1946, s. 1, sub-s. 1: "It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service . . ."

Section 6, sub-s. 1: "Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises . . . of a voluntary hospital, and in equipment, furniture or other movable property used in or in connexion with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part

"thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section."

Sub-section 2: "Subject to the provisions of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority."

Sub-section 4: "All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day . . ."

Sub-section 5: "Regulations may provide (a) for the apportionment, as between the Minister and the other persons

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the interests for other purposes will defeat the vesting sections of the Act. Section 1, sub-s. 1 imposes on the Minister the duty of establishing a comprehensive health service. This is the governing principle of the Act, and the vesting sections should be construed so as to give it the fullest effect. The question is, what is the proper construction of the words "held solely for the purposes of" the hospital in s. 6, sub-s. 1, and incorporated into s. 7, sub-s. 4 by virtue of the definition of "endowment" in sub-s. 10. Reference to other parts of the Act shows that the factual construction is right. Section 6, sub-s. 2, concerning hospitals belonging to local authorities, contains the same words: in that sub-section the defendants' construction cannot be right, as local authorities have the

"concerned, of interests in
"premises used partly for the
"purposes of any hospital to
"which this section applies and
"partly for other purposes and,
"in the case of a leasehold
"interest, for the severance there-
"of, and for vesting in the
"Minister and the other persons
"concerned the appropriate
"interests, and for the apportion-
"ment of rent payable in respect
"of any such severed lease."

Section 7, sub-s. 4: "All
"endowments of a voluntary
"hospital to which the last
"foregoing section applies, other
"than a hospital to which the
"foregoing provisions of this
"section apply, being endowments
"held immediately before the
"appointed day, shall on that
"day be transferred to and vest
"in the Minister by virtue of this
"Act free of any trust existing
"immediately before that
"day"

Sub-section 9: "Regulations
"may provide—(a) for the appor-
"tionment of any property held
"by the governing body of a
"voluntary hospital to which
"this section applies partly for
"the purposes of that hospital

"and partly for other purposes,
"being property which would,
"if it were held solely for the
"purposes of the hospital, con-
"stitute an endowment of that
"hospital, and for vesting the
"appropriate shares in the
"Minister or (in the case of a
"teaching hospital) the Board of
"Governors of that hospital, or
"(in the case of an endowment
"which would be transferred to
"a Hospital Management Com-
"mittee) that Committee, and
"the other persons concerned."

Sub-section 10: "In this
"section the expression 'endow-
"ment,' in relation to a voluntary
"hospital, means property held
"by the governing body of the
"hospital or by trustees solely
"for the purposes of that hospital,
"being property of the following
"descriptions"

Section 79, sub-s. 1: "'The
"governing body,' in relation to
"any voluntary hospital, includes
"any body, whether corporate
"or unincorporate, having the
"control and management of the
"hospital or any part thereof or
"otherwise carrying on the busi-
"ness of the hospital or any
"part thereof."

complete right to use their premises as they think fit at any time.

Sub-section 5 (a) gives power to make regulations regarding the apportionment of buildings held partly for a hospital and partly for other purposes ; it would be odd if, in the case where the whole of the premises had been used solely for hospital purposes, the unexercised power should exclude vesting under the Act. Section 7, sub-s. 9 (a) must also be construed in the Minister's favour as the words " held solely " there are used in contrast to " held partly " in fact for hospital and other purposes.

As to the trust deeds, the primary trust is for the home : only if that is discontinued are the trustees allowed to consider any other charitable application. The statute should be construed in the manner indicated by Denning L.J. in *Seaford Court Estates, Ltd. v. Asher* (1).

Sir Andrew Clark K.C. and *Newsom* for the defendants. As to the freehold premises, this Act is an expropriating Act, and will be construed strictly against the Crown : see *In re Bowman* (2), and the remarks of Lord Herschell and Lord Watson in *Kent County Council v. Gerard* (Lord) (3). In *Seaford Court Estates, Ltd. v. Asher* (1) the observations of Denning L.J. were obiter, and were made in connexion with the Rent Restriction Acts which were made for the protection of tenants : the observations are not referable to an expropriating Act.

In construing statutes it is not proper to have regard to what has been called " the substance of the transaction " : it is to the actual facts that the words of the Act must be applied : see the observations of Lord Tomlin, Lord Russell of Killowen and Lord Wright in *Inland Revenue Commissioners v. Duke of Westminster* (4). In s. 6, sub-s. 1, the word " used " is employed to denote the actual user of the premises, while the word " held " is referable to " interests " and " trustees." Accordingly the " interests " must be held by trustees on trust, and the trust deeds must be looked to in order to see whether the " interests " are held " solely for the purposes " of the hospital. Sub-section 2, concerned with local authorities, has no reference to trustees, and must be read in conjunction with s. 9, sub-s. 4, which relieves local authorities of the danger that buildings used temporarily for hospitals

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(1) [1949] 2 K. B. 481, 498.

(3) [1897] A. C. 633, 638, 642.

(2) [1932] 2 K. B. 621, 633.

(4) [1936] A. C. 1, 19, 24, 31.

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should vest. In the case of trustees, user is not the test, so they do not need the same saving provision. The provisions of the conveyances show that the defendants hold the land on trust to build a maternity home, then to manage it as thought fit, or to sell or let or mortgage it if thought fit, and to apply the moneys either for the purposes of the home, or for some other charitable purpose : therefore it cannot be said that the property is held "solely" for the purposes of the home.

As to the trust fund, this is not an "endowment" as referred to in s. 7, sub-s. 4 and defined in sub-s. 10. Here again, the powers given to the trustees by the settlement of 1926 enable them to use the fund for extraneous charitable purposes, and it cannot be said that such a fund is held "solely" for the purposes of the home.

Pearson K.C., in reply. If it is not thought right that the statute should be construed widely so as to give full effect to the duties of the Minister in s. 1, sub-s. 1, it should at any rate not be construed as a taxing statute, and the observations of the House of Lords in *Inland Revenue Commissioners v. Duke of Westminster* (1), already cited, should be applied.

WYNN-PARRY J. [after stating the facts.] In approaching the construction of such an Act as this, I have been proffered various and somewhat conflicting invitations. On the one hand, I was urged by the Attorney-General to interpret the relevant sections bearing in mind what he described as the overriding object of the Act, and with a view to assisting in its achievement. On the other hand, I was invited by Sir Andrew Clark, treating this Act as an expropriation Act, as indeed it is, to apply the same strict construction to which, it is said, taxing Acts are subjected. I think that the true view was that finally urged on me by Mr. Pearson, who, in reply, pointed out that there really was little between the two points of view when one remembers the guidance which is given by the House of Lords in *Inland Revenue Commissioners v. Duke of Westminster* (1), to discover the intention from the language which is used in the Act, and from no other source. I therefore approach the construction of these sections without any inclination either to struggle to help to achieve what may be the overriding object of the Act in favour of the Crown on the one hand, or to apply

(1) [1936] A. C. 1, 19, 24, 31.

to the language such a strict construction, on the other hand, as may result to the benefit of the subject, and I shall endeavour to interpret the relevant sections merely by application of the ordinary rules of construction which are applied by this court every day.

Turning to s. 6, sub-s. 1, it is to be observed that there are a number of conditions which must obtain before a voluntary hospital is transferred to and becomes vested in the Minister by virtue of the Act. What is to be transferred is interests in the premises which either formed part of the voluntary hospital or are used for its purposes, and movable property used in connexion with such places. Then the nature of the interests with which the sub-section is concerned is described. They must be interests held immediately before the appointed day ; they must be held by the governing body of the hospital or by trustees ; and they must be held either by that body or by the trustees solely for the purposes of that hospital. The real debate has centred round the phrase " being interests held by " trustees solely for the purposes of that hospital."

The conflicting views are as follows : on behalf of the Minister it is urged that the meaning of that phrase is that there are included all interests which were in fact immediately before the appointed day held by the trustees for the purposes of that hospital in which only those trustees were concerned and in which other persons were not concerned ; and that it therefore forms no part of the test to go further into the matter, in cases where no other persons were concerned, as is the fact here, than to ascertain what the position actually was immediately before the appointed day.

On the other hand, it is contended on behalf of the defendants that effect must be given to the employment of the verb " used " and the verb " held," between which there is a contrast. The verb " used " is employed to describe what was being done with the premises or the movable property. The verb " held " is employed to qualify the words " interest." Where, as is the case, that verb is used in conjunction with the words " by trustees " as qualifying interests, the result must be that the interests are interests held by trustees upon trust. Then, when those words are followed by the words " solely for " the purposes of that hospital," the court has to look at the trusts upon which the trustees held the interests in question, and see whether those trusts relate solely to the purposes of the hospital ; for, it is said, if the trusts were wider than trusts

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connected with the hospital, the result must be that it cannot be predicated of the interests in question that immediately before the appointed day they were held by trustees solely for the purposes of the hospital.

It appears to me that both those constructions have points which recommend them. There is, therefore, in my view an ambiguity in the sub-section. Before therefore I turn to the relevant documents, I must see whether there are elsewhere in the Act provisions which indicate or provide a context for the true interpretation of this difficult phrase "held solely." In s. 6, sub-s. 2, the Act is concerned with a different matter, namely, the case of hospitals vested in a local authority; and it is to be observed that the language employed in the earlier part of sub-s. 1 is not employed in the earlier part of sub-s. 2. The phrase which gives rise to the difficulty in this matter does appear in the later part of sub-s. 2, where it is provided, omitting words irrelevant to the present purpose, "all property held by a local authority immediately before " the appointed day being property held solely for the purpose " of these hospitals."

It is pointed out on behalf of the Minister, and, in my view, with considerable force, that local authorities are entitled, within very wide limits, to alter the purposes for which they hold property. It would have been possible for local authorities to change the purposes for which they held property used as hospitals. Therefore, it is said, the phrase "held solely" as used in that sub-section cannot have the construction contended for by the defendants under s. 6, sub-s. 1. As I have said, on the face of it, sub-s. 2 is not concerned with exactly the same matter; but the same phrase is used, and prima facie one expects that a phrase such as that will not have different meanings in different parts of the same Act.

Section 6, sub-s. 5 concerns apportionment, as between the Minister and other persons concerned, of interests in the premises; so that the condition for the operation of that sub-section is that there must be two sets of persons concerned, the Minister and the other persons concerned. Therefore it relates to property in regard to which, before the appointed day, two sets of persons were concerned, the governing body of the voluntary hospital or the trustees, as the case may be, on the one hand, and other persons concerned on the other hand. The interests of the predecessor of the Minister, namely the governing body or the trustees, must of course

be interests falling within sub-s. 1 or sub-s. 2 as the case may be. Therefore it does not appear to me that sub-s. 5 provides any conclusive guide to the answer to this point.

I must now consider para. (a) of s. 7, sub-s. 9. It is true that s. 7 concerns a different subject-matter, namely endowments of voluntary hospitals; but here again is this phrase "held solely." Sub-s. 9 (a) refers to regulations "for the apportionment of any property held by the governing body of a voluntary hospital." In view of the definition section, I think that phrase wide enough to include trustees, "to which this section applies partly for the purposes of that hospital and partly for other purposes, being property which would, if it were held solely for the purposes of the hospital, constitute an endowment."

The contrast there is between purposes of the hospital and "for other purposes" in the case of property which is held by a governing body. The purpose of the regulations is to effect an apportionment, the test applied being to see what would be the position if the property were held solely for the purposes of the hospital, that is, solely for the purposes of the hospital immediately before the appointed day. Finally, in sub-s. 10, there again occurs the phrase "held by trustees solely for the purposes of that hospital."

Reading that series of provisions, I feel driven to the conclusion that in s. 6, sub-s. 1, the phrase "held by trustees solely for the purposes of that hospital" bears the construction for which the Minister contends, and that it is not directed by the sub-section to pursue the inquiry as to what were the exact terms of the trust deed or deeds under which the trustees held the property, with a view to discovering whether, under those deeds, they had a power to divert the property, or any of it, to purposes other than those which were in operation immediately before the appointed day. In my view the sense of this series of provisions is that the court takes its stand once and for all on before the appointed day, and sees for what purpose the property was being held then; and, if the property was then being held for purposes of the hospital and for no other purposes in fact, that is an end of the matter, and property falling within that description passes under the sub-section to the Minister.

With that construction in mind, I turn to the deed of February 5, 1924. The trusts declared there are to hold the property "(a) upon trust that the said premises shall

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“ form the site for and that there shall forthwith be erected
“ thereon a maternity home ” ; secondly, “ the trustees shall
“ have the entire and absolute control of the said land and
“ buildings for the time being thereon, and the management
“ regulation repair and care thereof subject as hereinafter
“ provided with power at their discretion to delegate the said
“ management regulation, repair and care.” By cl. 2, “ it
“ shall be lawful for the trustees and the survivors
“ from time to time to build upon let mortgage sell pull
“ down re-build or alter and otherwise deal with the
“ said premises and any erections or buildings for the
“ time being thereon in such manner in all respects
“ as the trustees or trustee shall think fit.” It will be observed
that powers are included to let, to mortgage, and to pull down.

Clause 3, which is mandatory, provides that the trustees must apply and deal with all moneys which arise from any sale mortgage or other disposition under the power contained in cl. 2 “ either for the general purposes of the maternity home aforesaid or for such other public charitable purpose “ and in such manner as the trustees or trustee shall think fit,” with power to settle and approve any scheme. Then there follow restrictive covenants which, on the view which I take of the matter, are not really material. In fact, throughout the history of this trust, the trustees having erected the maternity home, managed and conducted it, and the land and premises were in fact being used at the appointed date for the purposes of a maternity home. On the construction which I place on s. 6, sub-s. 1, therefore, the land and premises in question passed to and vested in the Minister.

I turn now to the other point in the case, that is the question of the fate of the funds, the subject of the deed of September 29, 1926, to which I have already referred. As emerges from s. 7, sub-s. 4, the endowments there in question are endowments of a voluntary hospital to which s. 6 applies, and as emerges from sub-s. 10, the expression “ endowment ” means property held by the governing body of the hospital or trustees solely for the purposes of that hospital. I find nothing in s. 7 which provides a context which would enable me to interpret the words “ held solely for the purposes of that “ hospital ” differently from those words as used in s. 6, sub-s. 1. Indeed, I have prayed in aid certain of the provisions of sub-ss. 9 and 10 of s. 7 to interpret those words in s. 6.

It is in my judgment proper, unless the court is forced to

do otherwise, to give the same meaning to a word or a phrase throughout an Act of Parliament or other document under construction. Again, the fact emerges—there is no dispute on it—that at the appointed day the funds subject to the deed of September 29, 1926, were being used for the purposes of the hospital, and in my view solely for the purposes of the hospital. The deed is expressed to be supplemental to the previous deeds referring to the land and premises, and the recital is that “the settlors are desirous of endowing the said “maternity home in manner hereinafter appearing.” They are given power to retain the shares in question ; and there is a trust that the annual income be applied in perpetuity as provided in the deed. Clause 3 provides that the trustees “shall out of the income of the endowment in the first place “defray the cost of maintaining the structure and interior “of the said maternity home and of any annexe or other “buildings which may from time to time be erected in “connexion therewith in good condition and repair and of “insuring the same,” and other activities of management. Clause 4 concerns surplus income. It directs the trustees to invest it, and hold the investments resulting from it on the trusts declared concerning the endowment. By cl. 6 they are given power to apply the income as capital of the endowment “for the purpose of making such alterations, improve- “ments and additions to the structure and equipment of “this maternity home and the erection of an annexe or other “building in connexion therewith as the trustees shall from “time to time in their absolute discretion think fit.” By cl. 7, which was relied upon on behalf of the defendants, the trustees are given what is described as an overriding trust regarding the capital. The clause provides, “the trustees “shall if and when they think fit sell the said shares or other “the investments for the time being representing the endow- “ment and apply the proceeds of such sale for such other “charitable trust and in such manner as they shall think fit.”

Clearly, therefore, the trustees, but for the Act, could at any time have diverted the income of these investments from the maternity home ; but, on the construction which I have placed on ss. 6 and 7, that power is irrelevant, because at the appointed day the trustees were devoting the fund and its income towards the maintenance and running of the maternity home, and for no other purpose.

I therefore hold that, as in the case of the land and premises

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under s. 6, so in the case of the funds subject to the deed of September 29, 1926, they vest under the Act in accordance with the provisions of s. 7. In the result the Minister is entitled to the declaration asked for while the counterclaim fails and must be dismissed.

Judgment for the plaintiff.

[An order was made that the defendants should receive their costs, as between solicitor and client, out of the settled fund.]

Solicitors: *Solicitor, Ministry of Health ; Freshfields.*

F. R. D.

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[1948 B. 2895]

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Housing—Local authority—"Council houses"—Increase of rent—Claim that increase ultra vires and void—Whether "reasonable"—Meaning of "working classes"—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), ss. 83, 85, sub-s. 5.

Each of the plaintiffs was a tenant of the defendants, a local authority. They occupied houses provided by the authority under Part V of the Housing Act, 1936 ("council houses"). By s. 128 of the Act the authority were required to keep a housing revenue account. The report of the borough treasurer in 1947 showed that a greatly increased expenditure on housing repairs was estimated for the future, which would have caused a deficit in the housing revenue account if the rents of the council houses had remained unaltered. As a result of meetings of the housing committee of the authority on November 24, 1947, and December 30, 1947, it was decided that the deficit should be met by an increase in the rents of the council houses. The plaintiffs, suing on behalf of themselves and some 3,140 other tenants, claimed that the purported increases were ultra vires and void. They alleged that they were not reasonable within the meaning of s. 83 of the Housing Act, 1936, and that the authority had disregarded the requirements of s. 85, sub-s. 5, of the Act. The plaintiffs complained that the authority had wrongly regarded the matter from the angle of private estate management and had sought to make a profit; and, moreover, that certain expenditure had been charged to the housing revenue account which should have been borne by the general rate. The first plaintiff also contended that the rents of persons who had occupied council houses over a very long period ought not in any circumstances to be increased. That contention was not put forward by his counsel at the trial. The authority gave evidence that,

before deciding on the increase, they had carefully considered every relevant factor, including the rents ordinarily payable by persons of the working classes in the locality and the rents of comparable houses in private ownership.

Held, (1.) that the question whether or not the increased rents contravened s. 83 did not depend on whether certain items were wrongly debited to the housing revenue account, but on whether they were "reasonable"; that the authority had to consider the welfare of the tenants on the one hand and the interests of the ratepayers as a whole on the other; that it was their duty to maintain a balance between those two sections of the community so far as possible, having regard to the specific requirements of the Act; that the evidence did not show any unreasonableness on the part of the authority or that they had failed to observe the requirements of s. 85, sub-s. 5, and that accordingly the increase could not be impeached on the ground that it was ultra vires and void.

(2.) That the first defendant's contention that tenants who had occupied council houses over a long period of years ought never to have their rents increased was without any legal justification.

Observations of Denning J. in *H. E. Green & Sons v. Minister of Health* (No. 2) [1948] 1 K. B. 34, on the contemporary meaning of the term "working classes" adopted.

ACTION.

Each of the five plaintiffs was a tenant of a council house belonging to the defendants, Reading Corporation. The plaintiffs, suing on behalf of themselves and some 3,140 other tenants, claimed that two decisions of the corporation, through their housing committee, to raise the rents of houses of which the corporation were landlords were ultra vires and void.

The "council houses" in question had been provided by the corporation under Part V of the Housing Act, 1936. The houses were built between the two world wars. They afforded varying types of accommodation and amenities, and commanded different rents. By s. 128, of the Housing Act, 1936 (1)

(1) Housing Act, 1936, s. 83, sub-s. 1: "The general management . . . of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine."

Section 85, sub-s. 5: "In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may grant to any tenant such rebates . . . as they may think fit."

Section 128: "Subject to the provisions of this section, every local authority for the purposes

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the defendants were required to keep a housing revenue account. Three reports of the borough treasurer were submitted to the housing management and rent sub-committee on November 14, 1947. They were concerned respectively with the housing repairs account, the housing revenue account, and a review of rents. The housing repairs report showed that a greatly increased expenditure on housing repairs was estimated for the future. This was due to the increased cost of labour and materials and to the postponement of repairs during war years. The expenditure of the housing repairs account included contributions to the fire insurance fund. The defendants did not insure their property against fire, but in 1931 they had set up a fire insurance fund. This was an unofficial allocation until they obtained local act powers.

The debits in the housing revenue account included a proportion of the salaries of the technical staff of the borough

" of Part V of this Act shall
" keep an account (to be called
" the Housing Revenue Account)
" of the income and expenditure
" of the authority in respect of—
" (a) all houses . . . which at
" any time after the sixth day
" of February, nineteen hundred
" and nineteen, have been pro-
" vided by a local authority
" under Part V of this Act;
" (b) all land which at any time
" after the said date a local
" authority have acquired or
" appropriated for the purposes
" of Part V of this Act"

Section 129, sub-s. 1: " In
" each financial year a local
" authority who are required to
" keep a Housing Revenue
" Account . . . shall debit to
" the account amounts equal to
" . . . (iii) the expenditure of
" the authority for that year in
" respect of the supervision and
" management of such houses,
" buildings, land and dwellings,
" as are mentioned in the last
" foregoing section"

Section 130, sub-s. 1: " Subject
" to the provisions of subsection (2.)

" of this section . . . any surplus
" shown in a Housing Revenue
" Account shall . . . be carried
" forward in the Account to the
" next financial year."

Section 131, sub-s. 1:
" . . . every local authority who
" are required to keep a Housing
" Revenue Account shall . . . ,
" keep an account (to be called
" ' the Housing Repairs
" ' Account ')"

Sub-section 2: " . . . moneys
" standing to the credit of the
" Housing Repairs Account shall
" be applied only in meeting
" expenses incurred in respect
" of the repair and maintenance
" of the houses . . . in respect
" of which the Housing Revenue
" Account is to be kept."

Sub-section 3: " If . . . it ap-
" pears to the Minister . . . that
" moneys standing to the credit
" of a Housing Repairs Account
" are more than sufficient . . .
" he may give . . . directions
" . . . for the reduction of the
" amounts to be credited . . . or
" for the closing of the account
""

surveyor's and borough architect's departments, loan charges on unproductive sites, and a non-recurring item of war services charges. This account showed that up to 1944 an increasing surplus had been accumulated, which had now been greatly reduced. The proposed increased expenditure on repairs would cause a deficit in the housing revenue account if the rents of the council houses remained unaltered. The treasurer's reports were considered at the meeting of the housing, etc., sub-committee, and the treasurer's recommendations that the deficit should be met by increasing the rents were accepted.

The sub-committee submitted a report to the housing committee, in which they stated among other things that the cost of the programme in the borough architect's report would cause a net deficit of 18,203*l.* at the end of the current year. This deficit could be met either from the general rate fund or by an increase in the rents. The sub-committee stated that in their opinion, after careful consideration of the two alternative methods, they recommended the latter. The housing committee met on November 24, 1947, when they discussed the report of the sub-committee, which was approved and adopted by them.

The decision to increase the rents created considerable resentment and indignation among the tenants of the council houses. Two deputations on behalf of the tenants appeared before the housing committee on December 22, 1947. The first deputation was led by the first-named plaintiff, Percy Belcher. He told the committee that any increase of rent would create real hardship to the majority of tenants and result in a lowering of their general standard of living. He argued that certain charges which were responsible for the increased expenditure should be thrown on the ratepayers as a whole and not on the tenants alone. He also contended that persons who had lived in the houses over a very long period ought not to have their rents increased in any circumstances. His counsel did not put forward that view at the trial.

As a result of these representations by the tenants, the matter was reconsidered at a further meeting of the housing committee on December 30, 1947. They decided to modify by about one-third the increases previously resolved upon, having regard to the possible hardships which might be caused by the imposition of the increases as originally proposed. This was effected by freeing the housing revenue account from the incumbrance of idle loan charges on lands, roads,

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sewers and buildings, and by abandoning the surplus anticipated for March 31, 1949. The reduced increase did not prove acceptable to the tenants, and they continued a rent strike which had been organized in protest against the original decision of November 24, 1947. This was called off in February, 1948. On July 6, 1948, the writ in the action was issued.

The only witness for the plaintiffs was Belcher himself. He repeated the views which he had put before the housing committee on December 22, 1947. Counsel for the defendants said that he would have called no evidence and relied on his submission that there was no case to answer, had not the matter attracted so much publicity. For that reason the defendants were desirous of showing that their decisions were justified and reflected a desire to fulfil their duty to the tenants on the one hand and the general ratepayers on the other. Evidence was accordingly called for the defendants. The borough treasurer stated in his evidence that he was present at the meetings of November 17 and 24, 1947, when his reports were considered. He said that he told the sub-committee on November 17, 1947, that they must consider the rent ordinarily payable by persons of the working classes in the locality. He thought that the committee were well informed as to the kind of rents which would be payable. He said that on the whole the increased council rents were still below the rents of privately let estates which were built between the wars. The borough architect and deputy town clerk were also present at the committee meetings, and they gave evidence substantially to the same effect. A chartered surveyor said that he managed some 530 artisan dwellings at the present time. He thought that the accommodation afforded by the council houses generally was better than that afforded by similar houses in private ownership. He described the rents paid by the corporation's tenants as extremely reasonable for the accommodation offered, and he thought that the corporation's tenants had better value for their money than the tenants of the houses which he managed. An estate agent said that he regarded the corporation's rents as very reasonable and that they were lower than those generally paid for non-council houses of the same type.

Raeburn K.C. and *R. Millner* for the plaintiffs. The corporation disregarded their duty under s. 85, sub-s. 5 of the

Housing Act, 1936, to consider what rents are ordinarily payable by members of the working classes. Secondly, the increased rents are not a reasonable charge within the meaning of s. 83, sub-s. 1. That sub-section casts on the local authority a duty to make such reasonable charges as they may determine. That does not mean such charges as the local authority deem reasonable: that is for the court to determine. The local authority are not the arbiters of what is reasonable. The section is not drafted to have that effect. It means such charges as are *in fact* reasonable. The Rent Restriction Acts do not apply to local authorities. They are not allowed to make a profit, and are not required to make the houses pay. Schedule VIII to the Act contemplates that there may be a deficiency. It is the duty of the corporation to provide houses for the working classes at reasonable rents, but it is not to be done as a matter of business. The Rent Restriction Acts would preclude any private landlord from putting up the rents in order to create a surplus for himself or merely because increased costs of repairs were to be expected. Local authorities should not be allowed to raise the rents for these reasons: they have the moral duty of suffering the same burdens as private owners. This extra cost should be borne by the general ratepayers. The corporation cannot justify their debiting to the housing revenue account under the heading of supervision and management charges relating to unproductive land or a proportion of the architects' and surveyors' expenses. The war allowances should have been debited to the general rate fund and not to the housing revenue account. The local authorities began in 1931 to set aside a substantial sum for fire insurance: this may have been businesslike, but it was not allowed by s. 131, sub-s. 2.

Sir Andrew Clark K.C. and *G. Dunbar* for the defendants. Section 83 is purely permissive, but it is unlimited in scope. It vests an almost unlimited discretion in a local authority, subject only to the condition that the charges must be reasonable. That is the only reason why the court has a discretion in the matter. So long as the charges are reasonable, the court cannot inquire why they are made or for what purposes the moneys are required. The overriding principle is that the charges must be reasonable. The section does not mean that the court is required to examine the circumstances of each claim. If it did mean that, it would follow that every time the rent was increased by some small

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sum a tenant could complain that it should have been some other amount, and the court would have to inquire into it. Unless there is evidence to show that the charges are not such as the circumstances require, the court need not inquire into the matter at all. And the court is bound to hold that the charge which has been made has not been shown to be outside the statutory powers. The borough treasurer's report does not budget for any "fancy" surplus. The charges debited are quite legal. It might be said that they were not sound business: that is another matter. The evidence is clear that the housing committee carefully considered whether the increased charges were reasonable; and they compared them with rents ordinarily payable by members of the working class for comparable houses privately owned.

Denys Buckley for the Minister of Health as *amicus curiae*.

Raeburn K.C. in reply. What is good estate management is not the test for the type of account kept by local authorities, as they are not required to make a profit. "Reasonableness" is a relative conception. The question is whether the local authority acted within their powers or not. They did not comply with the standard of reasonableness required by the Act. A certain class of persons find difficulty in paying their rents without the assistance of the legislature. They are assisted in two ways: (1.) by the Rent Restriction Acts; and (2.) by the provision of accommodation some part of which is paid for by the local authority out of public money. The local authority should not regard their duty in this respect as that of ordinary landlords. The emphasis is on the provision of accommodation for those persons who, the legislature thinks, should be assisted. The object is not to give an advantage to a person because he (or she) is a member of a particular class, but to remove a disadvantage which he is under from being below a certain economic level. The Housing Act is intended to correct these disadvantages. The question here is whether the corporation approached the question with this aim. It is clear that they approached the situation as landlords who wished to make up a deficit. For that purpose they debited charges to the housing revenue account which they should not have done. Because the corporation approached the matter in this wrong way, they have not performed their statutory duty. Accordingly the decisions thus reached are null and void. The power to review rents from time to time is governed by the same principle.

as their power to fix rents. They failed to consider what rents were ordinarily payable by members of the working classes. A mere general discussion at a council meeting is not "consideration" as required by the Act. The difference between the working classes and other classes is the insecurity of wage earners as against salaried persons: *Rodwell v. Minister of Health* (1), and *H. E. Green and Sons v. The Minister of Health* (No. 2) (2).

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Nov. 15. ROMER J. read a judgment in which he stated the facts and continued: I must now consider the arguments which were addressed to me upon the facts and evidence. Before, however, so doing, I think it desirable that I should express my opinion upon the view which the first plaintiff intimated to the housing committee when he accompanied the deputation which they received, and which he repeated in his evidence before me: This view was in no way urged upon me by his counsel, but, as it is apparently held by some at least of the corporations' council-house tenants and may be shared by similar tenants in other parts of the country, it is right that I should say a word about it. The view is, in brief, that tenants who have occupied council houses over a period of years are, or should be, immune from any rent increase at all. For this view I am quite unable to find any legal warrant or sanction whatsoever, whether in the Housing Acts or otherwise. Parliament has provided the tenants of council houses with the protection of certain safeguards, and some of these fall to be considered in the present proceedings; but to say, for example, as the first plaintiff has said, that tenants of council houses built twenty-four years ago, who have occupied those houses since the beginning, ought not to have their rents increased in any circumstances is to present a point of view which, in my opinion, has no justification at all.

Turning now to the arguments of Mr. Raeburn on the question whether the rent increases were "reasonable," the general background of his case can be summarized as follows: He said that s. 83 of the Act of 1936 casts upon a local authority, when fixing charges for the tenancy or occupation of council houses, the duty of seeing that those charges are "reasonable"; and this does not mean only reasonable in the view of the

(1) [1947] K. B. 404, 411.

(2) [1948] 1 K. B. 34, 38.

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authority but reasonable in fact. He said that it was the intention of the Housing Acts that local authorities ought not to make a profit out of the letting of their council houses and that it is principally for this reason that such houses are not subject to the Rent and Mortgage Interest Restriction Acts. The argument is that it is the essence of the whole conception of council houses that housing authorities are to provide accommodation for the working classes at reasonable rents, and that the legislature did not intend a normal business relationship to exist between the local authorities and their working-class tenants.

The scheme of the Acts, it is said, is that there is a class of persons whose means are such that, without the assistance of the legislature, they would be under great difficulties in the payment of the rent of their houses. Accordingly the phrase "reasonable charges" in s. 83 requires a different interpretation from that which would be justified in relation to privately owned dwellings. It is argued that council-house tenants have, in their domestic budgets, to relate their outgoings to their income and that this is an essential factor which local authorities ought to bear in mind and which, it is said, the corporation in the present case did not bear in mind, when fixing the rents which are to be paid by their council-house tenants. On this background the plaintiffs formed their general complaint against the defendants who, they say, disregarded the considerations to which I have referred and approached the question of council-house rents as an ordinary problem of private estate management, and from the purely economic point of view.

The plaintiffs rely on specific instances of what they contend was the corporation's wrong approach to the economic condition of their housing estates. One of the matters which the housing committee had in mind when increasing the rents at their meeting on November 24, 1947, was the desirability of providing a surplus in the housing revenue account for the year ending March 31, 1949, and succeeding years; and the resolution of December 30, 1949, only qualified this intention to the extent of abandoning the proposed surplus as at March 31, 1949. This purpose of building up a surplus in the housing revenue account was attacked in two ways. First, it was said that, even assuming that a sound policy of private estate management would require or justify the creation of such a surplus, this ought only to be done, having

regard to the considerations already mentioned, at the expense of the ratepayers as a whole and not at the expense of the corporation's tenants. Secondly, it was said that the housing revenue account would not have needed fortifying or replenishing in this manner but for the fact that it had been wrongly reduced, over a period of years, by bearing charges which ought not to have been imposed upon it.

This latter objection introduces the plaintiffs' other specific grounds of complaint. Certain outgoings had been discharged from the housing revenue account which, the plaintiffs contend, ought to have been borne by the body of ratepayers as a whole. The first of these were the sums debited against the account under the heading of supervision and management. The plaintiffs say that these were incurred in the main in relation to unproductive land, and not in relation to the completed estates which were in the occupation of the tenants. It is argued that although, as a matter of account, these charges might properly be debited to the housing revenue account as arising out of supervision and management of "land" (s. 129, sub-s. 1 (iii) and s. 128 (b) of the Housing Act, 1936) the actual burden of such charges, to the extent that they related to unproductive land and were incurred in connexion with new schemes, ought to be borne by the ratepayers, on the ground that it was the borough as a whole that was getting the benefit of them.

Similar criticisms were made of the debit to the housing revenue account of loan charges on the unproductive sites. The resolution of December 30, 1947, abandoned the earlier intention of continuing to debit these charges in the future; but it had been the past practice of the corporation to debit them, and the plaintiffs say that it was wrong, and that the housing revenue account would have been in a more prosperous condition had they been charged against the rates. Then with regard to the war-service charges, a non-recurring item of nearly 1,000*l.*, the plaintiffs ask why these should be met out of their rents instead of by the ratepayers. Finally, the plaintiffs object to the fire-insurance fund, which was explained in evidence. The plaintiffs regard this fund as being a wrongful diversion of part of the housing repairs account which is, under s. 131, sub-s. 2 of the Act of 1936, properly applicable only to repairs; and they claim that, had the amount not been so diverted, the necessity for a rent increase would pro tanto have been diminished.

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I have referred specifically to all of the particular matters upon which the plaintiffs feel they have cause to complain. I do not, however, for a reason which I will shortly state, propose to analyse them further or consider in detail the grounds upon which the corporation justify the debits which are impeached. I need only say that, after carefully considering all the documents and the evidence in the case, I am far from satisfied that any of the relevant charges against the housing revenue account can legitimately be criticized; nor do I see anything wrong in earmarking to fire risk a part of the moneys standing to the credit of the housing repairs account. As to budgeting for a surplus in the rents, while it is true that the legislature contemplated a possible deficiency on a local authority's housing revenue account and provides (by sch. VIII to the Act of 1936) that any such deficiency shall be met out of the rates, surpluses on such account were also in contemplation, and their destination is provided for by s. 130 of the Act of 1936 and s. 21, sub-s. 3 of the Act of 1946; whilst a surplus on the housing repairs account is contemplated and provided for by s. 131, sub-s. 3 of the Act of 1936. It is to be observed that there is no statutory provision under which a surplus on the housing revenue account can be applied in reduction of the council-house tenants' rents.

The question, however, whether the corporation's decision can be impeached as being in conflict with s. 83 depends, in my judgment, not on whether it might have been preferable to charge this or that item against the ratepayers as a whole, or to have apportioned it in some manner between them and the tenants, but on whether the increased rents are "reasonable" as the section requires them to be. What the plaintiff tenants are seeking to do in these proceedings is to analyse in very considerable detail various items of the defendant corporation's past and contemplated expenditure and say: "This item ought to be borne by the ratepayers" or "that item should have been apportioned between them and us" and "if you do this or had done that you would not need extra rent or so much extra rent from us." If a local authority had indulged or were proposing to indulge, in some expenditure which had no relation to their housing estates and to raise their tenants' rents in order to pay for it, this kind of approach to the matter might well be both intelligible and permissible. But no such action or intention by the corporation has been proved in the present case, and I cannot

but think that the plaintiffs' attitude, if accepted, would result in the management and control of local authorities' estates being largely diverted from the authorities, to whom the legislature has entrusted it, to the courts.

Much of what I have ventured to describe as the background of Mr. Raeburn's argument on this question I accept. I would, however, point out that the corporation's tenants are not the only people whose interests they have to consider, for they have to bear the general body of ratepayers in mind as well. It seems to me that in solving the economic problems with which local authorities are confronted today, and which arise mainly from the greatly increased cost of materials and labour, they are placed in a position of not inconsiderable difficulty. It is, of course, clear that they have to consider the welfare of their tenants and to remember that those tenants are people of small—sometimes of very small—means. On the other hand they have also to be mindful of the interests of the ratepayers as a whole—the majority of whom, in Reading, as I was informed, are people of comparable means with the tenants of the council houses. It is their duty, so far as possible, to maintain a balance between these two sections of the local community, having due regard, of course, to any specific requirements of the Housing Acts. If the council-house rents were much below those prevailing in comparable private estates in the locality, then *prima facie* a local authority might be suspected of unduly favouring the tenants; while, if they were much in excess of such other rents, the presumption would be the other way round. I have already indicated that in my opinion the past policy of the corporation, as established by the evidence, is not deserving of the criticism that has been levelled against it; and it does not *per se* support any suggestion of unreasonableness on their part or any failure to take into account any consideration which they ought to have taken into account for the purpose of maintaining the balance to which I have referred.

Bound up with this view and, indeed, an essential element in its formation, is the test suggested by s. 85, sub-s. 5 of the Act of 1936, to which I will now refer in connexion with the alternative way in which the plaintiffs' case of *ultra vires* is presented. For, as I have indicated, the increased rents would *prima facie* require some justification in point of "reasonable-ness" if they were shown to exceed those that prevailed in comparable privately owned houses in Reading at the end

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of 1947. The plaintiffs contend in the first place that the defendant corporation never applied their minds to the requirements of s. 85, sub-s. 5 of the Act at all, and that their failure to do so in itself vitiates the decisions at which they arrived. It is true that the minutes of the meetings of November 17 and 24, 1947, contain no reference to the subject-matter of the sub-section and that, in the documents before me, it is only mentioned once, namely, in the borough treasurer's report of November 14, 1947, where he intimates that it is one of the considerations which had to be borne in mind in connexion with the pooling of rent. It is, however, clear from the evidence of the borough treasurer, of the borough architect, and of the deputy town clerk of Reading that the question of the rents payable by members of the working classes in Reading was considered at the meetings which were held on November 17 and 24, 1947.

I am satisfied that the obligation imposed by s. 85, sub-s. 5 of the Act was fully observed. Then, as to the comparison between the increased rents on the one hand and the rents for working-class dwelling houses prevailing in the locality on the other, Mr. Raeburn's principal criticism of the evidence of Mr. Mann and Mr. Martin was that they did not know the nature of the occupations of the tenants who inhabited the houses which those witnesses or their firms, respectively, managed. They might be blackcoated workers, Mr. Raeburn suggested, or at all events persons of greater affluence than is commonly the case amongst members of the working classes.

As to this I may say that, in the light of modern conditions, I share the difficulty which Denning L.J. felt and expressed in *H. E. Green & Sons v. Minister of Health (No. 2)* (1) with regard to who does, and who does not, belong to the working classes. It does not appear to me that this description is the prerogative nowadays of any particular section of the British people. The phrase has a far wider, and far less certain, signification than it used to possess, and it is to be observed that, possibly for this reason, it has now been jettisoned from s. 85 by sch. I to the Housing Act, 1949. In so far as the expression, the working class, is still capable of definition, there is no doubt but that it can properly and fairly be applied to the tenants of the privately owned houses in and near Reading of which particulars were given in evidence. Mr. Raeburn further submitted that these houses do not afford

(1) [1948] 1 K. B. 34, 38.

a reliable comparison with the council houses in the matter of rentals, in that the latter carry—or usually carry—the additional advantage of government subsidies, and also because of the profit margin which is presumably present in the rents of private estates.

Notwithstanding these considerations, the evidence in question, and the material upon which that evidence was based, leave me in no doubt that the view, which they both expressed, that the increased council-house rents compare very favourably, from the point of view of the tenants, with those payable in respect of similar but privately owned dwellings in the district was justified. It is further to be observed that the plaintiffs adduced no evidence at all to establish the contrary view. I would add, though this is perhaps immaterial, that such rents do not compare unfavourably with rents for similar accommodation belonging to the other local authorities in southern England whom the corporation approached for information.

The conclusions at which I have arrived are accordingly that the decisions of the corporation which the plaintiffs seek to impeach in these proceedings were not *ultra vires* whether from the point of view of s. 83 of the Housing Act of 1936 or of s. 85, sub-s. 5, or for any other reason. The defendant corporation have, in my judgment, carefully and conscientiously observed their duties to their tenants to the best of their ability without losing sight of the duties which they also owe to the ratepayers of the borough as a whole. The increases which they have felt compelled to make in the rents of their council houses are doubtless, and understandably, unwelcome to the tenants. The latter must, however, realize that these increases are not due to any unreasonable disregard by the corporation of their interests, but to the economic pressure of existing conditions, a pressure from which no one today is free.

Having regard to the views which I have expressed, I need do no more than mention a point which arose out of s. 129 of the Act and emerged from the further defence of the defendants which was delivered shortly before the trial. By their statement of claim the plaintiffs attacked, as already stated, the proprietary or validity of certain debits which the corporation had made in their housing revenue account. The corporation accordingly applied to the Minister of Health for a direction with regard to these debits under s. 129, sub-s. 5. The Minister intimated that in his view some

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of those debits ought not in strictness to have been made, but gave the direction required in order to regularize the position. The corporation, as an alternative defence, accordingly relied on this direction, but Mr. Raeburn, in opening the case before me, said that he was proposing to contend that the direction was not authorized by s. 129 or otherwise and was, accordingly, invalid. It did not appear to me to be right that this point, which was one of wide importance, should be debated or decided without giving the Minister an opportunity, if he so desired, of being represented before me. He was accordingly communicated with and, as a result, Mr. Buckley appeared as *amicus curiae* on his behalf. In view of my conclusions on the main issue, however, the question does not fall to be decided, and in the circumstances it is better that I should say no more about it.

It accordingly only remains for me to say that the action fails and must be dismissed.

Solicitors : *W. H. Thompson ; Sharpe, Pritchard & Co., agents for the Town Clerk, Reading ; Treasury Solicitor.*

I. G. R. M.

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In re FISON'S WILL TRUSTS, FISON v. FISON

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[1949 F. 1400.]

Feb. 1, 2.

Will—Construction—Options to purchase specified shares at "par value"—Whether defeated by changes in nature of property—Option to purchase realty at stated prices—Whether taken subject to incumbrances—Real Estate Charges Act, 1854 (Locke King's Act) (17 & 18 Vict. c. 113), s. 1.

A testator by his will dated May 11, 1918, directed his trustees to hold certain of his shares in two limited companies on trust to pay the income from them to his wife during her life and after her death to offer the shares to two sons at "par value" in equal shares. He then made provision in case either son should predecease the tenant for life or be unwilling to exercise the option. He also gave a life interest to his wife in two freehold "estates" and directed that, after her death, both estates should be offered to one of the sons whom he named, if living, at specified prices. The testator died on February 19, 1920, and his widow, the life tenant, died on January 24, 1949. In the events which had

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

happened since the testator died, questions arose both on the options to purchase the shares and on the option relating to the realty.

In 1929, one of the companies was absorbed by another company, and the settled shares were exchanged for shares in that company. Subsequently, a rearrangement was made of the preference-share capital. The other of the two companies also underwent radical changes and was eventually wound up. The trustees received money from the liquidator for the settled shares in that company, and they invested most of it. The summons asked whether the two sons could exercise the options to purchase the shares in the two companies notwithstanding the changes that had occurred. Further, if the options were exercisable, the court was asked to determine what should be the basis for computing the price which the sons would have to pay in exercising their options.

The real estate affected by the option to the one son was subject at the death of the life tenant to an equitable charge in favour of the residuary estate and a mortgage raised for the payment of estate duty and for the purchase of seven cottages which the testator had contracted to purchase before he died. In relation to this option, the summons asked whether that son, in exercising his option, took subject to incumbrances affecting the properties at that time.

Held, (1.), following *In re Cant's Estate* (1859) 4 De G. & J. 503, *In re Kerry* [1889] W. N. 3, and *In re Armstrong's Will Trusts* [1943] Ch. 400, that the sons were entitled to exercise the options in regard to the shares notwithstanding the changes that had occurred in relation to them, a right to purchase at a stated price being prima facie bountiful, unlike a bare right to purchase; and that, on the true construction of the will, the price to be paid for the shares, in exercising the option, was to be equivalent to the nominal value of those shares when the testator died.

(2.) Following *Given v. Massey* (1892) 31 L. R. Ir. 126, and *In re Wilson* [1908] 1 Ch. 839, that the son, in exercising the option to purchase the two freehold estates, was entitled to a conveyance free from incumbrances.

In re Jolley (1901) 17 T. L. R. 244, and dictum of Eldon L.C. in *Radnor (Earl) v. Shafto* (1805) 11 Ves. 448, 455, not followed.

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A testator made his will on May 11, 1918. He died on February 19, 1920. His widow, who survived him and to whom he gave certain life interests, died on January 24, 1949. By his will, after appointing executors and trustees and making certain pecuniary bequests, he said: "I bequeath my 'shares in ' Joseph Fison & Co. Limited ' and in the ' The ' Chemical Union Limited ' which I died possessed of as follows: as to one equal fourth part thereof to my trustees

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“ upon trust to pay the income thereof to my said wife during
“ her life and after her death my trustees shall offer to sell the
“ said fourth part of my shares to my sons Frank Guy Clavering
“ Fison and John Reginald Gifford Fison at par value in
“ equal shares and if one of my said two sons shall decline the
“ offer thus made to him his share of the said one fourth part
“ shall be offered at the same price to the other said son and
“ if only one son shall be living then the whole of the said
“ fourth part of my shares shall be offered to such son at par
“ value and any of such shares not sold to my said sons or son
“ shall be otherwise sold and the proceeds of sale of the shares
“ held in trust for my said wife shall fall into and form part of
“ the residue of my estate.” Then he disposed of the other
three-quarters of his shares, and made a disposition with
regard to his real estate. After that he gave all his real and
personal property not otherwise disposed of to his trustees on
the usual trust for sale with power to postpone.

When the testator died, he had shares in both the specified
companies, but on April 11, 1929, Joseph Fison & Co., Ltd., was
absorbed (with another company) by Packard & James Fison
(Thetford), Ltd., and shares in James Fison & Co., Ltd., were
exchanged for shares in the new company. Before the
absorption of James Fison & Co., Ltd., the trustees of the will
had held 752 ordinary shares of 10*l.* each in that company on
trust for the widow for life; but, when the company was
absorbed, those shares were exchanged for 15,040 *l.* ordinary
shares and 3,760 seven per cent. *l.* preference shares in
Packard & James Fison (Thetford), Ltd. The name of the
company was afterwards changed to Fison's Limited. Sub-
sequently, the preference share capital was rearranged,
fourteen four and a half per cent. preference shares being issued
in place of every nine of the existing seven per cent. preference
shares; and, in consequence, the 3,760 seven per cent. shares
became 5,848 four and a half per cent. preference shares.
Those shares were still held by the trustees, and their present
market value was 44*s.* for each *l.* ordinary share and 22*s.* for
each *l.* preference share.

The Chemical Union, Ltd., had also undergone radical changes
since the testator died. At that time it was a trading company,
but in 1926 it ceased to be so and became an investment
company. In 1948 the company was wound up. The
trustees received 13,952*l.* from the liquidator in respect of the
shares settled on the widow, 122 preference shares, and, apart

from 2,835*l.* still held by them as cash, they had invested most of that money.

The further option to purchase real estate was given in the will in the following terms " I devise my estate known as the " 'Stutton Hall estate' including 'Crepping Hall estate' " and all my real estate situate in the parish of Stutton in the " county of Suffolk unto and to the use of my said wife for " and during her life she keeping the same in repair and " insured against fire and I hereby direct and declare that " from and after the decease of my said wife the said heredita- " ments and premises shall form part of the residue of my real " estate hereinafter devised and shall after her decease be sold " accordingly. Provided always and I hereby declare that " before selling the said hereditaments so devised to my wife " for life as aforesaid my trustees shall after her decease offer " the Stutton Hall Estate at the price of 15,000*l.* and the " Crepping Hall Estate at the price of 8,000*l.* to my son Frank " Guy Clavering Fison if living."

When the tenant for life died on January 24, 1949, these estates were subject to certain incumbrances. First, there was an equitable charge in favour of the residuary estate which had arisen thus: after the testator died, his trustees paid 3,531*l.* to Barclays Bank, Ltd., being money which the testator had borrowed from the bank, securing the loan on those estates by a memorandum of deposit. Secondly, the trustees had mortgaged the estates in order to pay estate duty and to purchase seven cottages adjoining the Stutton Hall Estate, which the testator had contracted to purchase before he died.

The trustees by this summons asked, *inter alia*, whether the sons were entitled to exercise the options given to them by the will of the testator to purchase the shares in Joseph Fison and Co., Ltd., and The Chemical Union, Ltd., notwithstanding the changes that had occurred, and whether the option given to the son by the will to purchase the Stutton Hall and Crepping Hall estates was an option to purchase those estates at the prices specified free from the incumbrances existing on them at the date of the death of the tenant for life or subject to them.

Droop for the trustees.

J. A. Reid for the first defendant. The interest conferred by the gift in a will of an option to purchase property cannot be

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defeated by a change in the nature of that property however caused. The person to whom the option is given has the right to follow the subject-matter of the option. [Counsel referred to *In re Cant's Estate* (1); *In re Kerry* (2); and *In re Armstrong's Will Trusts* (3). However, this right to follow does not necessarily exist where the right given is one of pre-emption, as distinct from an option. The rights given to the sons in this case were clearly options.

The trustees were directed to offer the shares at "par value": that means a price equivalent to the nominal amount of the shares at the date when the testator died. The options conferred a right immediately the testator died, and, consequently, the price was fixed at that time, even though the rights were not exercisable immediately.

The second question concerns the option to purchase realty. *Prima facie*, the Real Estate Charges Act, 1854 (4) (Locke King's Act) which is now replaced by s. 35 of the Administration of Estates Act, 1925, applies to such a gift, and the person to whom the gift was given took subject to any incumbrances affecting it. However, *In re Wilson* (5) decided that Locke King's Act did not apply if the donee took as a purchaser and not as a devisee. Here the son exercising the option was a purchaser and, consequently, he took free from incumbrances.

Lightman for the other defendants. It is conceded that, if an option is subject to a prior life interest and, in the interval before it falls into possession, a change takes

(1) (1859) 4 De G. & J. 503.

(2) [1889] W. N. 3.

(3) [1943] Ch. 400.

(4) Real Estate Charges Act, 1854, s. 1: "When any person shall, after December 31, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised

"shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgages debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof"

(5) [1908] 1 Ch. 839.

place in the property, the person to whom the option was given has the right to follow the property provided that the option is, in effect, a bequest or devise made with the intention of conferring a bounty. But if the option gives a mere right to purchase at a fair price, and that is the present case, the person to whom the option is given ranks as a purchaser and cannot follow the property. In *In re Armstrong's Will Trusts* (1), Cohen J. distinguished *In re Flint* (2) on that ground. [Counsel referred also to *In re Wilson* (3) and Halsbury's Laws of England (2nd ed.), vol. 34, pp. 34-35, art. 29.] The general scheme of this will shows that the testator did not intend to confer a bounty. His paramount intention was to keep the family business in the family and only to sell the shares to the sons if they would pay a fair price for them. He had doubts whether the sons would choose to exercise the options, and so made provision in case either of them did not do so. There is no evidence that, at the date of the will or at the date of the death, the shares were worth more than their par value.

If, however, the sons can exercise the option in spite of the changes which have occurred, then the question arises what was meant by the "par value" of the shares. It means the value at par of the shares held at the time when the options are exercised: the words "par value" are used so as to cover changes in the nominal value which may occur between the date of death and the exercise of the option, e.g., by a reduction of capital. If the sons follow the shares in order to exercise the options, they must follow for all purposes. In the case of *The Chemical Union, Ltd.*, the par value would be as at the moment when the shares were realized in 1948. If that basis is wrong, then there is no measure of the price which should be paid and the options must fail altogether.

The option to purchase realty is a devise to the son. The testator evidently intended to confer a bounty on his son because the evidence establishes that the price he had to pay in exercising the option was less than the probate valuation at the death of the testator. *In re Wilson* (3) did not lay down a general principle of law that a person to whom an option was given was a purchaser. Warrington J. decided in that particular case that the grantee of the option was a purchaser; but it was going beyond the scope of his decision to say that if

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(1) [1943] Ch. 400. (3) [1908] 1 Ch. 839.
(2) [1927] 1 Ch. 570.

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an option were clearly bountiful, the person exercising it was a purchaser and, as such, was relieved from paying off encumbrances. In *In re Jolley* (1) Joyce J. said that the grantee of an option had the status of a devisee. He did not, apparently, consider *Given v. Massey* (2) which Warrington J. thought supported his decision in *In re Wilson* (3). *In re Jolley* (1) was not cited in *In re Wilson* (3). There was, however, no real conflict between *In re Jolley* (1) and *In re Wilson* (3) for *In re Jolley* (1) concerned an option which was clearly bountiful, while in *In re Wilson* (3) the donee of the option took as a purchaser at a fair price. [Counsel also referred to *Radnor (Earl) v. Shafto* (4).]

The will describes the properties which were subject to the option as the "hereditaments so devised to my wife." She took subject to the incumbrances and therefore the option referred to the property in that state. If the wife had exercised her power of sale as tenant for life, the son could not have been entitled to follow more than the net proceeds of sale: the trustees could not have been required to add to the net purchase price remaining after paying off incumbrances.

ROMER J. [after stating the facts.] The first question is whether, notwithstanding the changes affecting the testator's shares in those two companies, the options conferred or granted to the two sons became operative on the death of the testator's widow. It appears to me that the matter is substantially concluded, so far as this court is concerned, by authority.

Counsel for the first defendant, one of the sons, referred to *In re Cant's Estate* (5), the headnote to which states: "Land "was devised in trust for the testator's widow for life, and "after her death for sale and division of the proceeds among "his children equally, with a direction that the trustees should "offer the land to the testator's son, at a specified price, upon "the death of the widow. The land was purchased by a "railway company, under the powers given by their Act, for "more than twice the specified sum. *Held*, that the son "was entitled to the difference." It was argued on behalf of the grantees of the options that their interest was not affected by the operation of the railway statute which could not alter the rights of the parties. Against that, it was argued that the object of the testator in granting an option to Charles Cant

(1) (1901) 17 T. L. R. 244.

(4) (1805) 11 Ves. 448.

(2) (1892) 31 L. R. Ir. 126.

(5) 4 De G. & J. 503.

(3) [1908] 1 Ch. 839.

was that he might use the land for a particular purpose, and that, as the land was sold during the life tenant's life, the testator's intention became incapable of being carried into effect.

Knight Bruce and Turner L.JJ. disposed of the matter very shortly. Knight Bruce L.J. said: "By a contract of purchase under the powers of a railway Act, a sum of money was substituted for land and became subject to all the rights which affected the land. The land had been devised with other property by the owner to his wife for life, and after her death all was to be sold, and the testator in effect said, 'as to a particular portion,' namely, the land now in question 'my son shall have it if he shall elect to be charged for it with 450*l.* as between himself and my estate.' I conceive that this right remains not affected by the act, and that the son is entitled to take the purchase-money, whether amounting to hundreds or thousands, on paying the sum which the testator has specified in his will, just as he would have been entitled to the land itself if it had not been taken by the railway company."

Turner L.J. said: "The whole argument of the respondents rests on this, that the testator only intended to benefit his son Charles, in the event of his continuing to be a gardener. The true test of this argument is, whether, if he had ceased to be a gardener in his father's lifetime he would still have been entitled to the land. This question admits of no doubt, and the only consideration then is, whether, if the right remained at the death of the testator, the Act of Parliament subsequently passed can affect it. I am of opinion that it cannot." So the option was held to be subsisting.

Counsel for the first defendant also referred to *In re Kerry* (1), where, according to the report "A testator by his will devised his real estate to trustees, on trust for sale. The proceeds of sale were to be applied in paying the testator's debts and bequests, and the residue invested and held on certain trusts. The testator directed that no sale of his dwelling-house, shop, and stock-in-trade should be made under the trust, until the trustees should, when they had determined to sell the same, offer the property for sale to his son G. W. Kerry at the price of 1,500*l.* in preference to any other person. If the son should refuse to purchase the

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“ same when offered to him for sale, or should he neglect or
“ refuse to complete the purchase within six calendar months
“ after the same should have been so offered to him, the
“ trustees should be at liberty to sell the property to any other
“ person. A similar option to purchase two cottages was
“ given to a daughter of testator, the price fixed being 350*l.*
“ The testator's real estate was sold in a creditor's administra-
“ tion action for the payment of his debts. The dwelling-
“ house, etc., was sold for 2,350*l.*; the two cottages were sold
“ for 550*l.* After the debts had been paid there remained
“ a surplus of less than 1,050*l.* in court. The son, G. W.
“ Kerry, claimed to have the surplus divided between himself
“ and the daughter, in the proportion of 850*l.* to 200*l.*, those
“ sums being the respective amounts by which the purchase-
“ moneys of the two properties exceeded the respective option
“ prices.”

North J. said : “ *In re Cant's Estate* (1) was an analogous
“ case, though not a direct authority. Effect ought to be
“ given so far as was possible to the provisions of the will. The
“ intention of the testator was that, if the son and daughter
“ exercised the option to purchase, the other persons entitled
“ under the will should not receive more than 1,500*l.* and 350*l.*
“ from the two properties respectively. The option was
“ intended to be a benefit ; the excess in value above the
“ price fixed was intended to go to the person to whom the
“ option was given. The sale in the creditor's action was not
“ made under the trusts of the will, and, before the persons
“ interested in the residue could take any benefit, the excess
“ above the option prices must be paid to the son and daughter
“ respectively. The surplus must be divided between them
“ in the proportion of 850*l.* to 200*l.*”

Thirdly, counsel referred to *In re Armstrong's Will Trusts* (2).
The headnote states : “ A testator by his will made in 1899.
“ gave to his wife a life interest in land and to his son an
“ option, exercisable within twelve months after his wife's
“ death, to buy the land for 5,000*l.* In 1900 the testator died.
“ His widow, as tenant for life, sold and otherwise dealt with
“ parts of the land. She died in 1942, and over 19,000*l.* was
“ due to be received in respect of her dealings with the land.
“ Three days after her death the son purported to exercise his
“ option :—*Held*, that the son had validly exercised the
“ option and was entitled to the moneys receivable in respect

(1) 4 De G & J, 503.

(2) [1943] Ch. 400.

“ of his mother’s sales of and other dealings with the land or
 “ to the investments representing them.”

Cohen J. considered *In re Flint* (1) where, to quote the headnote “ a testator who died in 1920 gave his property to “ trustees, and settled the entirety upon trust for various “ beneficiaries in undivided shares. He empowered the “ trustees at any time to sell any part of his estate, subject to “ a right of pre-emption thereby given to his son Alfred over “ Property A at a price to be fixed by the trustees’ valuer “ before sale. On January 1, 1926, the land vested in the “ trustees on the statutory trusts for sale, etc., under sch. 1, “ pt. 4, s. 1, sub-s. 3, of the Law of Property Act, 1925: *Held*, “ on the construction of the will, that the right of pre-emption “ was only intended to attach to an exercise of the power of “ sale under the will, and not to a sale under the statutory “ trusts or any other extraneous powers. *Held*, also, that, “ even if the right of pre-emption was intended to attach to “ any sale whatever by the trustees, it was not enforceable “ against the statutory trusts of s. 35 either as an ‘ equitable “ ‘ interest or power’ within s. 3 and s. 205, sub-s. 1 cl. (ix.), “ or as an ‘ additional or larger power ’ conferred by the will “ on the trustees within s. 28, sub-s. 1, as amended by the “ 1926 Act Schedule ; or as an incumbrance” It was accordingly held “ that the trustees on executing the statutory “ trusts could disregard the right of pre-emption.”

Cohen J. said (2) “ That case seems to me, however, to be distinguishable for two reasons. In the first place, Alfred was “ not given any option to buy at a fixed price. The testator “ merely directed that he should receive the first offer at a “ price to be fixed by a valuer at the time when the trustees “ decided to sell. The valuer would fix a proper price as “ between willing buyer and willing seller, and it is impossible, “ therefore, to argue that the intention of the testator by “ fixing a price was to confer bounty on Alfred. In the second “ place, the question what right, if any, Alfred might have in “ the proceeds of sale, was not considered at all. I cannot, “ therefore, derive assistance in the present case from the “ decision in *In re Flint* (1).” The judge referred also to *In re Cant’s Estate* (3) and *In re Kerry* (4) and approved the headnotes.

Subject to one point which I will mention in a moment,

(1) [1927] 1 Ch. 570.

(2) [1943] Ch. 400, 402.

(3) 4 De G. & J. 503.

(4) [1889] W. N. 3.

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those decisions govern the present case. It might be thought that, as The Chemical Union, Ld. ceased to exist during the widow's lifetime and the trustees had received cash in respect of the settled shares and had invested that cash, the present position was outside the testator's contemplation and outside the scope of his disposition. But it seems to me that those events are comparable to the events which were considered in the three cases to which I have referred, in which the court saw no difficulty in holding that the options given in relation to the property could be exercised in connexion with the money representing the proceeds of sale.

Counsel for the persons interested in the residuary estate was inclined to concede that if, on the matter of construction of the will, the court came to the conclusion that the testator intended to confer a bounty upon these two sons, then those cases would apply ; but he said that there was no reason to suppose that the testator intended to confer bounty on these sons but that he intended to create the ordinary position of vendor and purchaser, his idea being to keep his family companies, and, as appears from other parts of the will, certain family estates, within the possession of his own family. He points out that there were a good many options given in the will, that the testator showed that it was very possible that the options might not be attractive propositions, and that he needed to provide for what should happen in the event of the options not being exercised. He argued that that showed that the testator did not regard this as a bounty or benefit which he was conferring on his sons, but was merely making provision for what should happen in the events which I have described. He referred to *In re Wilson* (1) as showing that a person in the position of these sons should be regarded as a purchaser and not as a beneficiary.

For some purposes it is plain that they are to be regarded as purchasers if and when they exercise their option, but that does not lead to the conclusion that the element of bounty was absent from the granting of the options. It is evident that the element of bounty was present. The options were granted to his sons, although no evidence was given in this case, or in any of the reported cases, to what was the value of the shares at the date of the testator's death, or what the testator regarded as being their value. Nevertheless, when a man gives property by his will or makes provision in his will under which one of his

(1) [1908] 1 Ch. 839.

children is entitled to take either one or more of his assets at a definite price, that in itself is an indication of bounty, for it was otherwise open to any of his children to buy the property or to bid in the market for it against all the world. He could be run up in the bidding, and, if he chose to bid high enough, he might get the property ; but the right to bid is a right held in common with everybody else. When the testator said that, if the sons were prepared to pay *x*l., they could have the property, that was *prima facie* a bounty. In the light of the cases to which I have referred, these options are exercisable notwithstanding what has happened to the shares.

Counsel for the persons interested in the residuary estate argued that the testator evidently contemplated the grant of the option as not an act of bounty but an act of family policy because he gave alternative options, providing what was to happen if the options were refused. That element was present also in *In re Kerry* (1) ; and a very sensible explanation of that precaution is that, if the shares were in fact worth only about their par value when the option became exercisable, it might well be that one of the sons would not want to take up the shares, while the other one, having greater confidence in the future of the company, or for some other reason, might take up the shares instead. The matter down to this point is covered by authority which is binding on me.

Then comes the question, assuming that the options are still exercisable, or were still exercisable when the widow died, what price the sons have to pay in order to acquire the investments in cash which now represent the original shares ? The direction which the testator himself gave was : " I bequeath " my shares in these two companies which I die possessed of " as follows," and there followed a direction for paying the income of one fourth to his wife for her life, and that after her death the trustees shall " offer to sell the said fourth part " of my shares to my sons Frank Guy Clavering Fison and " John Reginald Gifford Fison at par value in equal shares."

Counsel for the persons interested in the residuary estate said, first, that the direction failed because the testator intended to project his mind forward to the par value at a future time, namely, the time when the option should be exercised. So far as the Chemical Union shares are concerned, at all events, there is no measure now of what should be paid for them because those shares became cash, which cannot be valued. The subsequent investment of that cash is a mere incident,

(1) [1889] W. N. 3.

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and a yardstick of value cannot be derived from those investments. Alternatively, he argued that the court must take the ordinary price of the shares in Fison's Limited to which the original shares in Joseph Fison Limited could be traced, and that that is the value which the sons must pay.

The difficulty of the case is that the testator never contemplated the events which in fact happened, or, if he did contemplate them, certainly did not provide for them in express terms. It may be that when he said that the trustees should offer the said fourth part of my shares at par value, he may have had in mind the par value of those shares at the time when his widow should die and the option might become effective. But I think that it is open to me to construe this will in such a way as to give effect to the disposition and to interpret this direction as meaning the purchase price at par value of the shares at the time he died, because those are the shares with which he was actually dealing, since he said that he bequeathed his shares which he now possessed as follows, and then gave an option in relation to the par value of those shares. The result of that would be that at his death it would be known what shares he held, and what the par value of those shares was. From that moment onwards, accordingly, everybody concerned would know what would be the price at which in future the options could be exercised. The result, therefore, is that the gift has the same effect as though it had been said in the will in substitution for "the said fourth part at par value," "the sum which the shares in the aggregate were worth at par "at the time when the testator died."

Accordingly, I hold that the options are exercisable, and that the two sons are now entitled to purchase in equal shares at the price of 7,520*l.*, 15,040 *l.* ordinary shares, and 5,848 four-and-a-half per cent. preference shares in Fison's Limited, and to purchase in equal shares at the price of 1,222*l.* the investments and cash now representing the sum of 13,952*l.* which was received by the trustees on the liquidation of The Chemical Union, Ltd. in April, 1948, and also any further sums payable by the liquidator. [His Lordship then disposed of a point of construction raised by the summons and continued.]

The further question is whether the one son, in exercising his option to purchase the Stutton Hall estate for 15,000*l.* and the Crepping Hall estate for 8,000*l.*, as he has in fact done, is entitled to have the properties conveyed to him free from the charges to which they were subject. The answer to

that question depends on whether the son is to be regarded in this respect as a devisee under the testator's will, or as a purchaser of the estate in pursuance of the contract of sale created between himself and the trustees in the exercise of his option.

The matter is not free from complication, and there is difficulty in reconciling some of the authorities. It depends largely on the construction of the testator's will. [His Lordship read its relevant passages and continued :] If the true position is that the son is to be regarded as a devisee, then, by reason of Locke King's Act, he can only take these properties under his option subject to the incumbrances affecting them. On the other hand, if he is a purchaser, he is entitled to a conveyance free from the incumbrances.

[His Lordship referred to the evidence which showed that the estates were worth more than the amount at which they were assessed for probate even if they were valued subject to the incumbrances at present affecting them, and continued :] Counsel for the persons interested in the residuary estate argued that the son in exercising his option was only entitled to the same subject-matter as that in which his mother had enjoyed a life interest, and that was the Stutton Hall estate and the Crepping Hall estate subject to the charges imposed upon them. If that be so, then he would only get those estates subject to the mortgages. But I am unable to accept that view. It puts too great a strain on the language used, which was simply identifying the property the subject of the disposition. The mere fact that the mother was to take a life interest in those estates first and that an option relating to those estates was exercisable at her death does not mean, I think, or even indicate, that the testator had in mind that the subject-matter should, in the case of the mother and in the case of the son, be affected by the same incidents. So that I do not think I am much assisted by the description of the estates which the testator thought right to employ.

Mr. Lightman said that there is authority for the proposition that, in such a case as the present, the person to whom the option is given should be regarded as a devisee ; that is to say, where an option is plainly beneficial, then the recipient of that option would be treated as a devisee. He referred to these observations of Lord Eldon in *Radnor (Earl) v. Shafto* (1), in relation to rights of pre-emption : " But my

(1) 11 Ves. 448, 455.

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“ judgment upon this case is, that under the circumstances
“ that have taken place, no one is entitled by this will to the
“ right of pre-emption proposed. In the case that has been
“ put by the Attorney-General, of an estate, worth 50,000*l.*,
“ offered to a particular person at 30,000*l.*, and the other case,
“ where the testator directs the trustees to make an offer at
“ a reasonable price, to be fixed by them, the court possibly
“ to one intent would hold either will to amount in substance
“ to a devise of the estate itself, if that person would accept it
“ upon those terms : but, if the effect of the option could be
“ construed as high in either case, the person must in his life
“ do some act, denoting, that he accepts the benefit : or the
“ court cannot consider him as being in the same circum-
“ stances, as if he had made a contract for the purchase of the
“ estate. In this instance, if Mr. Duncombe had accepted
“ the offer, and done any act, denoting that purpose, even by
“ his own will, it might have been compared to the case of
“ contract : but if that person dies without doing any act, it
“ cannot be said, that the case is the same as if he had con-
“ tracted for a purchase ; or, that his real representatives
“ could call upon his personal property to pay for that estate ;
“ if it had been contracted for.”

Lord Eldon further said (1) : “ Upon the whole, this right
“ of pre-emption does not exist in any one at present. It is
“ not necessary to say, what the court will do with rights of
“ pre-emption in general, when that question may arise. This
“ case does not call for a decision upon it.” I do not propose
to go further into the effect of that case, but it suffices to say
that Lord Eldon's observations quoted were not necessary
for the decision of the quite different question before him.

In re Jolley (2), was decided by Joyce J. The facts are
thus stated in the report : “ In this case a question arose in
“ the administration of the estate of the late Mr. Benjamin
“ Jolley, of Cambridge. It came before the court upon an
“ originating summons taken out for the purpose of determining
“ how the estate duty payable in respect of certain property
“ taken by two of the testator's sons, under an option given
“ to them by the will, in satisfaction of their respective shares
“ in the residuary estate of the testator should be borne as
“ between them and the other persons interested in the
“ residuary estate.” I do not propose to go through all the
facts ; but what happened was that, among other things, the

(1) 11 Ves. 457.

(2) 17 T. L. R. 244.

testator gave an option to his sons to appropriate to their original shares in his estate "certain specific items of his property consisting partly of real and partly of personal estate, and including the goodwill and stock-in-trade of his business of a furniture broker, but on the terms that his said son should be liable to discharge and indemnify the rest of his estate from and against all debts and liabilities due or subsisting in respect of his said business at his decease. This option was exercised by the two sons on June 6, 1900, and the property which they elected to take thereunder was conveyed and assigned to them on July 24, 1900. The executors and trustees had paid the estate duty in respect of the whole estate, and the question was whether the sons were entitled to take the specified property freed and discharged from any proportion of that duty. The question turned to some extent upon s. 9, sub-s. 1, of the Finance Act, 1894."

Joyce J.'s judgment is thus summarized in the report: "So far as personalty was concerned, his Lordship thought, under that direction the estate duty, including that upon the property subject to the option, was payable by the executors out of the general personal estate. Further the testator had directed that mortgage debts should be paid primarily out of the property charged therewith. His Lordship would therefore infer, but this was only conjecture, that the testator intended his sons, taking under the option, to bear the estate duty in respect of the real estate taken by them under the option. On the other hand, cl. 25 of the will did say that the option was to be exercised on the terms that the sons should be liable to discharge and indemnify the rest of the testator's estate from and against all debts and liabilities due and subsisting in respect of the business at his decease. It might be argued, therefore, that, as there was no mention of estate duty there, any intention on the part of the testator that the sons should bear that duty was excluded. But his Lordship had to deal with s. 9, sub-s. 1, of the Act of 1894 The effect of that was, according to the decided cases, that a specific devisee must bear the estate duty in respect of the property which he took under the devise. It might be that the cases went further than that, but at any rate they went as far. What, then, was the effect of the exercise of the option by the sons under cl. 25 of the will? After some consideration his Lordship had come to the conclusion that its effect was to make the case

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“ the same as if the testator had devised his real and personal estate upon trust to sell everything except the property which was subject to the option and there had been a specific devise to his two sons of the equitable fee in the real property subject to the option. His Lordship was of opinion in those circumstances that the charge created by s. 9, sub-s. 1, of the Act remained until the real property subject to the option came to the hands of the beneficiaries and the duty was discharged by them.” In other words, he held the estate duty in respect of the real estate comprised in the option was payable by the sons.”

Of *In re Wilson* (1), a more recent case, the facts were thus stated in the Law Reports: “ The testator, Ahab Wilson, by his will dated September 1, 1890, after giving a legacy to his wife, devised and bequeathed two houses known as Stanley Villas and all other his real and personal estate to trustees upon certain trusts under which his widow was to be entitled to receive the income during her life, she thereout paying the interest of all principal moneys secured on the real estate. After her death or marriage the trustees were to hold the property upon trust for sale and conversion and to stand possessed of the proceeds upon trust for all his children who should attain twenty-one, or, being daughters, should marry. On December 13, 1893, the testator made a codicil to his will, of which the material part was as follows: “ This is a codicil to the last will and testament of me Ahab Wilson of Stanley Villas, Over, in the county of Chester, sawyer, which will bears date the first day of September, 1890. I direct the trustees of my said will to allow my son Frank the option of purchasing at the death of my wife my two freehold dwelling houses known as Stanley Villas, Over, and the garden and land held therewith all belonging to me for the sum of 450*l.* but I declare that my said son shall exercise the right to pre-emption hereby given to him within four months after the death of my said wife.’ The testator died on December 25, 1893. and his widow died on November 27, 1907. The property called Stanley Villas was subject at the date of the codicil, and was still subject, to a mortgage for 300*l.* On December 17, 1907, Frank Wilson exercised his option by giving notice to the trustees of his intention to buy Stanley Villas for 450*l.*, and he took out a summons to determine the question whether the option

“ to purchase the houses was an option to purchase them free
 “ from the incumbrances existing thereon at the date of the
 “ testator’s death, or subject thereto.”

It is to be observed from that that, both in the will and in the
 codicil, the description of the subject-matter is given as
 “ Stanley Villas, Over ” so that the argument on construction
 which has been addressed to me in the present case as to the
 subject-matter of the two dispositions being identical could
 have been raised in *In re Wilson* (1), though the report does
 not show that it was.

Warrington J. said : “ This is certainly a curious case and
 “ one on which there appears to be no authority except the
 “ decision of Porter M.R. in Ireland, which is directly in
 “ point.” It is plain from that observation and from the rest
 of the report that *In re Jolley* (2) was not cited to him. The
 judge goes on : “ and what I am in fact asked to do is to say
 “ that in my opinion that decision is not correct The
 “ point arose exactly in *Given v. Massey* (3). The
 “ facts in that case were these. The testator devised and
 “ bequeathed all his estate, real and personal, to trustees
 “ upon trust for sale and conversion, and he then directed as
 “ follows : ‘ I declare that the said Robert Loughrey shall
 “ ‘ have the option of purchasing part of the lands of Straw
 “ ‘ and part of the lands of Bonnanaboigh at the price
 “ ‘ of 1,400*l.*, such option to be declared in writing within
 “ ‘ three months after my death.’ These lands were subject
 “ to a judgment for 180*l.* and a mortgage for 450*l.* The
 “ testator then directed his trustees on payment of the 1,400*l.*
 “ within six months after his death ‘ to assure the same here-
 “ ‘ ditaments and premises to the said Robert Loughrey, his
 “ ‘ heirs and assigns, or as he shall direct ’

“ Pausing there for a moment, there is in the present case no
 “ direction for the conveyance of this property, and that
 “ omission is in my opinion favourable to the contention of
 “ the son. The Master of the Rolls says : ‘ There are no
 “ ‘ words purporting to devise the Straw and Bonnanaboigh
 “ ‘ property to Loughrey at all. It is plain that what the
 “ ‘ testator meant was that all his property should be sold ;
 “ ‘ and that if Loughrey chose, he, and no one else, should be
 “ ‘ the purchaser of the lands at Straw and Bonnanaboigh at
 “ ‘ a fixed price ; but I can see no indication of any intention

(1) [1908] 1 Ch. 839.

(3) 31 L. R. Ir. 126.

(2) 17 T. L. R. 244.

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“ that Loughrey should, when once the price was agreed to—
“ by him and paid, be on a different footing from any other
“ purchaser. If he did not buy, the lands would have to be
“ sold to someone else. On the language of this will, it is
“ clear that the testator meant that Loughrey was to be a
“ purchaser, and nothing else—a favoured purchaser no
“ doubt, but still a purchaser. The element of bounty does
“ enter into the matter; but the bounty conferred is the
“ right to become a purchaser on advantageous terms, and
“ not a devisee of the estate. And I may observe in passing
“ that the idea of bounty would be entirely frustrated by a
“ construction which would subject Loughrey to a burthen
“ in respect of incumbrances which might render the bargain
“ a losing one on his part ”

“ The words of that part of the judgment apply to the facts
“ in the present case, and the question is whether the decision
“ is right. So far as construction is concerned this case is even
“ stronger in favour of the purchaser than that before the
“ Master of the Rolls.” Then he sets out the relevant passage
of the will and proceeds: “ Reading that power in connexion
“ with the trust for sale and conversion which is given to the
“ trustees, the trustees, having that power to sell to any one
“ they please, are bound in the first place to offer this property
“ to the son. If he desires to have it and if he exercises his
“ option, in my opinion he elects to become a purchaser and
“ must be taken to have made an offer to the trustees which
“ they are bound to accept and must be taken to have
“ accepted. If they do not expressly accept it, it will be
“ taken by intendment of law that they have done so as if it
“ was their duty to do so. Thus it will be inferred from the
“ facts that there is a contract by the trustees to sell and by
“ the son to purchase the houses. It is said that that is not
“ enough, because the son is a person claiming through or
“ under the testator and can only take this property subject
“ to existing charges under Locke King’s Act

“ I need not read further. The Master of the Rolls in
“ Ireland came to the conclusion that it would be improper to
“ treat a person in this position as a devisee of the property,
“ and, therefore, that the first section of Locke King’s Act
“ did not apply to the case before him, and it could not be said
“ that the donee of the option was not entitled to have the
“ incumbrances paid off out of the estate. It is said now that
“ the Master of the Rolls stopped too soon in his reading of

“ the section, and that he ought to have gone on to consider
 “ the words ‘ but the land or hereditaments so charged shall,
 “ as between the different persons claiming through or under
 “ the deceased person, be primarily liable to the payment of
 “ all mortgage debts with which the same shall be charged ’
 “

“ Therefore, with great respect, I think the Master of the
 “ Rolls was right in his opinion that as the purchaser could
 “ not be treated as the heir or devisee the provisions of the
 “ Act did not apply to him. But, whether that is the true
 “ view or not, on the construction of this codicil I think the
 “ intention of the testator was to place the son in the same
 “ position as any outside purchaser would have occupied. He
 “ made no other provision for him beyond a share of the
 “ residue, and he made it incumbent on the trustees, if the
 “ son expressed his desire to purchase the property, to sell it
 “ to him at a particular price. They are just as much acting
 “ under the trust for sale as in the case of any other purchaser.
 “ Therefore the son is entitled to have the property conveyed
 “ to him free from incumbrances.”

The judge stated that no other provision was made for the son beyond a share of residue, but the will and codicil there show that the son derived precisely the same benefits and interests in the testator's estate as his brothers and sisters, but that he acquired this option as well, so that he was in fact better off than his brothers and sisters.

That case appears to me to have a striking resemblance to the present, because the essential considerations apply to both. Here, as there, there was a trust for sale of this property to take effect upon the death of the widow ; but projected in front of that trust for sale was this option. It seems to me that the observations of Warrington J. “ the trustees, having
 “ that power to sell to any one they please, are bound in the
 “ first place to offer this property to the son. If he desires
 “ to have it and if he exercises his option, in my opinion he
 “ elects to become a purchaser ” apply to the present will as they applied to the will that was before him. As I have said, *In re Jolley* (1) was not cited to Warrington J.; nor was the Irish case *Given v. Massey* (2), cited to Joyce J. in *In re Jolley* (1), as it might have been having regard to the date.

It is to be observed that the Master of the Rolls in *Given v. Massey* (2) had Lord Eldon's observations in *Radnor (Earl) v.*

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(1) 17 T. L. R. 244.

(2) 31 L. R. Ir. 126.

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Shafio (1) cited to him. He referred to them thus: "This declaration of opinion [by Lord Eldon] is entitled to weight; but it was not necessary for the decision of the question before the court, and the decision, in fact, went upon other and different grounds." The Master of the Rolls differed from the view expressed by Lord Eldon. The Irish case was elaborately discussed, and was followed by Warrington J. in *In re Wilson* (2). Warrington J. expressed views in that case which were at variance with those enunciated by Lord Eldon.

In re Wilson (2) is a decision, on a will which in all material respects bears a marked resemblance to the one before me, that the true position of a person to whom an option of this kind is given is that of a purchaser, or, rather, that of a person with a right to purchase as distinct from being a devisee.

In re Wilson (2) has not, so far as counsel are aware, and so far as I am aware, come up for consideration before any other court on the point which I have to decide. But it has been referred to among other cases in *In re Wimbush* (3). It is difficult in the extreme to reconcile *In re Jolley* (4) with the Irish case *Given v. Massey* (5), and the English case *In re Wilson* (2). But it appears to me that my duty is to follow the decision in *In re Wilson* (2) which, in my judgment, is binding upon me and governs the present case. In the first place, *In re Wilson* (2) was decided some seven years later than *In re Jolley* (4). In the second place, *In re Jolley* (4) is not very elaborately reported, and I do not know what arguments were addressed to Joyce J. or what cases were referred to, as none of them is mentioned. In the third place, *In re Wilson* (2) has the strong support of the authority, not, of course, binding on this court, but entitled to considerable weight, of the Master of the Rolls in Ireland in *Given v. Massey* (5). Accordingly, I will give effect to the decision in *In re Wilson* (2) and hold that this son is entitled to the conveyance of these estates free from any incumbrances.

Judgment accordingly

Solicitors: *Wrinch & Fisher, for Block & Cullingham, Ipswich; Torr & Co.*

(1) 11 Ves. 448, 455.

(2) [1908] 1 Ch. 839.

(3) [1940] Ch. 92.

(4) 17 T. L. R. 244.

(5) 31 L. R. Ir. 126.

In re RIDLEY, DECD.HARMAN
J.NICHOLSON *v.* NICHOLSON AND ANOTHER

[1950 R. 139.]

1950

Apr. 20.

Administration—Order of application of assets—Debts and funeral and testamentary expenses—Whether realty exonerated—Devise of “all my real estate which includes”—Whether residuary devise—Administration of Estates Act, 1925 (15 Geo. 5, c. 23); s. 34, sub-s. 3, sch. I, Part II, para. 2.

The Administration of Estates Act, 1925, s. 34, sub-s. 3, provides that the real and personal estate of a deceased person “shall, subject . . . to the provisions, if any, contained in “his will, be applicable towards the discharge of the funeral, “testamentary and administration expenses, debts and liabilities “payable thereout in the order mentioned in part II of the “First Schedule to this Act.” The second item there listed is “Property of the deceased not specifically devised or bequeathed “but included (either by a specific or general description) in a “residuary gift”

By her will, a testatrix gave a number of specific legacies. By cl. 6 she made the following devise: “I give free of all death duties “all my real estate which includes Manmead, Covert and Maperton “and my advowsons to the said G. N. absolutely” By cl. 7 she gave a number of pecuniary legacies. By cl. 8 she directed: “I give the residue of my property including property “over which I have a general power of appointment to the “said G. N. . . .” It was conceded that the pecuniary legacies were payable wholly out of personalty. By reason of the large amount payable in death duties on the real and personal estate, the personalty would have been insufficient to pay the pecuniary legacies and the specific bequests, in addition to the death duties on the real and personal estate and the debts and funeral and testamentary expenses. Unless, therefore, a proportion of the duties were payable out of the real estate, the pecuniary legacies would have to abate.

Held, that the will showed an intention within the meaning of s. 34, sub-s. 3, of the Administration of Estates Act, 1925, sufficient to vary the order of application of assets laid down in para. 2 of part II of sch. I to the Act; and that accordingly the above-mentioned expenses and death duties did not fall on the realty until the personalty was exhausted.

Semle: cl. 6 was not a “residuary gift” within the meaning of the schedule.

Dictum of Farwell J. in *In re Rowe* [1941] Ch. 343, adopted. *In re Anstead* [1943] Ch. 161, considered.

ADJOURNED SUMMONS.

By her will dated February 9, 1946, the testatrix, Mary

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Stephanie Ridley, appointed the plaintiff and the first defendant to be her executors and trustees. She gave free of duty specific bequests amounting to about 14,000*l.* By cl. 6 she made the following devise: "I give free of all death duties "all my real estate which includes Manmead, Covert and "Maperton and my advowsons to the said Godfrey Nicholson "absolutely" At the end of cl. 6 she requested the devisee of the real estate to keep in good order certain family graves. The gross value of her real estate was 31,100*l.* By cl. 7 she gave a number of pecuniary legacies, which amounted to nearly 30,000*l.*, some being free of legacy duty and some not. By cl. 8 she directed: "I give the residue of my property "including property over which I have a general power of "appointment to the said Godfrey Nicholson" The gross value of the personal estate was 83,616*l.* 13*s.* 2*d.* on which the estate duty was 34,907*l.* Estate and succession duties on the real estate amounted to about 8,000*l.* Her debts, funeral and testamentary expenses amounted to 1,632*l.* 0*s.* 3*d.* If the pecuniary legacies were payable wholly out of personalty, that fund would not, by reason of the large amount payable for death duties, have been sufficient to pay the specific bequests, the death duties on both personalty and realty, and the debts and funeral and testamentary expenses.

The questions on the summons relevant to this report accordingly were: (1.) whether the pecuniary legacies were payable (a) only out of the residuary personal estate or (b) out of both the real and personal residuary estate but primarily out of the latter, or (c) or rateably out of both those funds; (2.) how the debts and funeral and testamentary expenses (including estate duty on the personalty) ought to be borne; (3.) how the estate duty and succession duty on the realty ought to be borne. It was conceded that the pecuniary legacies were payable wholly out of personalty, and argument was heard on questions (2.) and (3.).

Nigel Warren for the plaintiff, one of the executors.

R. O. Wilberforce for the second defendant, a pecuniary legatee [being asked to address the court first]. The funeral and testamentary expenses ought to be borne according to the Administration of Estates Act, 1925. The Act did not alter the law, so far as the payment of legacies is concerned, but it did do so with regard to debts and funeral and testamentary expenses. That is to say the real estate is now made answerable

pari passu with the personal estate: para. 2 of pt. II of sch. I to the Act of 1925 (1). The real estate given by cl. 6, is property included by a "general description in a residuary "gift" for the purposes of the schedule. It is necessary to look at the form of each will to see whether there is a residuary gift. If the testatrix had had any other real estate, it would have been swept in by the general residuary gift in cl. 6. It is admitted that cl. 6 does not use the word "residue" and that cl. 8 does use it, but it is not necessary that the word "residue" should be used to constitute a residuary gift: *In re Bawden* (2). All that is necessary is that it should be a gift which sweeps in all the relevant property. Nor is it necessary that something should have been excepted from it to make a gift residuary: *Mason v. Ogden* (3).

There may be more than one kind of residuary gift in a will. Any gift which disposes of the universality of the type is a residuary gift, and it applies both to realty and personalty: see Wolstenholme and Cherry's Conveyancing Statutes (12th ed.), vol. 2, p. 1523. It is inaccurate to say that a gift of residue was specific under the law in force before 1925, and in any case that was altered by s. 34 of the Administration of Estates Act, 1925: see Jarman on Wills (7th ed.) vol. 2, p. 916. *In re Rowe* (4) is distinguishable on the form of that particular will, and in any event the judgment in that case on this question was obiter. In *In re Anstead* (5) it would appear from the headnote that resort is to be had to the residuary personalty before the residuary realty. The headnote, however, is not quite accurate. In any event, that case does not assist on the question whether cl. 6 of the will is a residuary gift; but, on the assumption that it is such a gift, it shows in what order the testamentary expenses and debts ought to be paid.

(1) Administration of Estates Act, 1925, s. 34, sub-s. 3: "Where the estate of a deceased person is solvent his real and personal estate shall, subject to . . . the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act." By para. 2 thereof:

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"Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid."

(2) [1894] 1 Ch. 693, 699.

(3) [1903] A. C. 1, 4.

(4) [1941] Ch. 343.

(5) [1943] Ch. 161, 164.

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Wilfrid Hunt for the first defendant, the second executor and also the devisee and residuary legatee. The testatrix has shown that she intended to vary the statutory order laid down in the schedule. By s. 34, sub-s. 3, that order is subject to any variation contained in the will. That does not necessarily mean an express variation. The gift in cl. 6 in which the testatrix directed that her real estate should be given free of all death duties is a sufficient provision in her will to vary the statutory order. The dictum of Farwell J. in *In re Rowe* (1) exactly covers this case. The real residuary gift is in cl. 8, which is sufficient to take in any realty as well as personalty that is not specifically disposed of. [Counsel also referred to *Lancefield v. Iggulden* (2).]

HARMAN J. [after stating the facts:] It was admitted, and the admission was inevitable, that, on the peculiar form of this will, pecuniary legacies could only be paid out of the personal estate and that real estate was not subject to them. The effect of that would be that the pecuniary and specific legacies added to the debts and the death duties on both realty and personalty more than exhaust the personal estate. Therefore, if there is nothing more to look to in order to pay both the duties and the pecuniary legacies, the pecuniary legacies will have to abate to some extent. It is said that, having regard to the Administration of Estate Acts, 1925, that is not right, but that the primary fund for payment, not of the legacies, but of the testamentary expenses, in which are included death duties on both realty and personalty, is the realty and the personalty not specifically bequeathed. It is to be noted that the devise of the real estate is not in a sense a specific devise: it is a general devise of realty, and admittedly would cover any realty of which the deceased died possessed. But that realty is devised free of all death duties. The result of such a devise as that is to cast the burden of the death duties which are ordinarily charged upon the real estate on to the personal estate. Consequently, it was the intention of the testatrix that her real estate should have the burden of this duty discharged by the personalty. It is also noticeable that she does not describe it as "the rest of my real estate" or "my other real estate," she describes it as "my real estate" including certain named properties which were in fact all the real estate she had. Having disposed of that, in the next

(1) [1941] Ch. 343, 348.

(2) (1874) L. R. 10 Ch. 136, 141.

clause she gives the pecuniary legacies, and in cl. 8 gives what she calls "the residue of my property" which is a true residuary clause which would sweep up realty as well as personalty if any were undisposed of. If for instance the devise in cl. 6 failed, cl. 8 would be sufficient to take it up. So that cl. 8 is not confined to personalty, but is a general residuary devise and bequest.

It is therefore clear that the intention of this testatrix was that her realty should be given separately from whatever would remain; that the devisee of that was meant to take it free of the imposition of death duties; and that whoever took the residue was, on the other hand, to take whatever there was left after payment of the legacies which follow the devise under the will. Nevertheless, Mr. Wilberforce says that, having regard to the terms of s. 34 of the Administration of Estates Act, 1925, a result follows which I will explain in a moment.

[His Lordship read s. 34, sub-s. 3, and continued :] It has been decided, and is not now disputed, that that has nothing to do with legacies. Here, an even larger amount than legacies is the estate duty on personalty, and that is obviously included in this section. Item no. 1 in pt. II of sch. I, is property undisposed of by will, which does not come in here. The second item is "property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies."

In re Anstead (1), decided by Uthwatt J., shows how that schedule is meant to work. He said: "It follows that the first thing to be done in administering a solvent estate is to set aside out of residue a fund to satisfy the pecuniary legacies. That is the first charge, and it is a charge primarily on residuary personalty rather than on the residuary real estate." In the present case it is charged solely on the residuary personalty. Therefore, if the schedule is to apply, there must be set aside out of the residuary personalty the pecuniary legacies and in addition the estate and succession duty on the realty, and the legacy duty on these because to give the realty free of duty in that way is to give a legacy along with the realty. So that there is about 38,000*l.* set aside. The judge went on (1): "The result is notionally to

(1) [1943] Ch. 161, 164.

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“ divide the residue into two separate funds, the first to meet
 “ pecuniary legacies (and for the purposes of this fund personal
 “ estate is the primary fund and only in so far as it is in-
 “ sufficient is there to be any resort to realty) and a second
 “ fund consisting of the balance of the residue, including
 “ residuary real estate. In meeting debts and testamentary
 “ expenses the second fund must be exhausted before the
 “ first is touched.” The headnote to the report of the case
 is wrong because it would lead one to the conclusion that the
 judge held that for the purpose of paying debts and
 testamentary expenses personalty was to be resorted to first,
 and that, quite clearly from the judgment, is not so.

If, then, cl. 6 were a residuary gift, the property included in it
 would rank with the personalty included in cl. 8, subject to the
 retention out of the latter of the sum of 38,000*l.* or so to which
 I have referred, and the result would be that about half the
 estate duty on the personalty would fall upon the realty. This,
 of course, is most obviously a topsy-turvy result; it defeats
 every intention that the testatrix has expressed. She wanted
 the duty on the realty to be paid by the personalty. The
 result of her will is said to be that duty on the personalty is
 borne in part by the realty. That is a most surprising con-
 clusion, but one which, says Mr. Wilberforce, is the result of
 the order of payment in which I am directed by the statute to
 proceed.

I have two further matters to consider in that respect.
 Section 34, sub-s. 3, of the Act of 1925 was made specifically
 subject to the provisions, if any, contained in the will; and the
 schedule itself says in para. 8: “ The order of application
 “ may be varied by the will of the deceased.” Is there, then,
 enough in the will of this deceased to alter the order of this
 application? In my judgment there is: I think that a will
 which gives the realty by a general devise of this sort, which
 is not on the face of it residuary and which expressly throws
 the duty on that realty on to the personalty, which is followed
 by a gift of legacies, and followed again by what is obviously
 a true residuary clause, shows an intention that the legacies
 and also the expenses shall not come on to the realty until the
 personalty is exhausted. That seems to me to be, as a mere
 matter of construction, the inevitable result of the way in
 which the testatrix has made her will.

Supposing that I am wrong on that point, then arises a
 question of some nicety, namely, whether this property, the

realty, is "not specifically devised or bequeathed, but included" (either by a specific or a general description) in a residuary "gift." In other words, is cl. 6 a residuary gift? It seems that there is much to be said on both sides of the question. It has been pointed out that before the Wills Act, 1837, all devises of realty were specific. A devise had no ambulatory character so as to embrace subsequently acquired realty. That was altered by s. 24 of the Wills Act, which did it in this way: not to give to a devise of realty the same effect as a bequest of personalty, but to say that, in reference to the real estate comprised in it, the will should be construed as if executed immediately before the death. In that way the legislature cured that particular blot, because, of course, if the devise were treated as if it were made immediately before the death, any real estate which a man acquired in his lifetime must be included in the description of "all my real estate."

That was commented on in *Lancefield v. Iggulden* (1), the headnote to which states: "A residuary devise of real estate" is still specific notwithstanding the 24th section of the "Wills Act." Lord Cairns, after reciting s. 24, said this (1): "There is nothing in the Act to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises." Then he goes on to discuss *Hensman v. Fryer* (2), which decided that a residuary devise of realty was specific.

It is said by Mr. Wilberforce, and he cited a passage in Jarman, (7th ed.), vol. 2, p. 916, that that is an inaccurate expression only used as a compendious way of saying that the residuary realty used to stand upon the same footing as specifically devised realty for the purpose of payment of debts. He says that the object of the schedule has been to alter that defect. I do not think that that is a matter to which I need refer, for what I have to consider is whether this is a residuary gift.

In my judgment, cl. 6 of this will, although in a sense it contains a general devise of realty, is not a residuary gift. I cannot think that a clause placed as this one was, even though it might have a certain sweeping-up effect by virtue of s. 24 of the Wills Act, really was in any sense a residuary gift within the meaning of the Act of 1925.

I am supported in that view by a dictum of Farwell J.

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(1) L. R. 10 Ch. 136, 141.

(2) (1867) L. R. 3 Ch. 420.

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in *In re Rowe* (1), where he was considering this schedule. The decision was that the law had not been altered by pt. II of sch. I to the Act. The form of the will was "I devise all my real estate and bequeath all the residue of "my personal estate." Farwell J. decided following the decision of Clauson J. in *In re Thompson* (2) that real estate there had not been given in one mass with personal estate and that the old rule in *In re Boards* (3) still applied, and went on this way—not quite accurately I think—"Accordingly, I hold "that the property of the deceased not specifically devised or "bequeathed but included by a specific or general description "in a residuary gift for the purpose of sch. I, pt. II, para. 2, "of the Act does not include the real estate of the testator in "this case: for according to the construction which I place "upon this particular will the real estate is devised, not as "part of the residue, but as a specific devise to the named "persons, the residue which is given being the residue of the "personal estate." Having regard to the fact that the words there were "I devise all my real estate and bequeath all the "residue of my personal estate" all in one sentence, that case is very much less strong than the present one. Nevertheless, it was held that the real estate devised by that will was not, within the meaning of this schedule, included in the residuary clause.

If that be right, it is clear that the present case is a stronger one, and, although I am not bound by that decision because it was not necessary for the conclusion at which he arrived, it is none the less a decision of that judge, and I should be very sorry to differ from it. I agree with the reasoning: I cannot think that cl. 6 was what is meant in this schedule as being a residuary gift, and if necessary I should be prepared so to hold; but the reason for my decision is that the statutory order has been altered by the terms of the will and that it therefore does not apply.

Declaration accordingly

Solicitors for all parties: *Withers & Co.*

(1) [1941] Ch. 343, 348.

(2) [1936] Ch. 676.

(3) [1895] 1 Ch. 499.

I. G. R. M.

In re A DEBTOR (No. 416 of 1940). *Ex parte* THE
OFFICIAL RECEIVER, TRUSTEE *v.* HUBBARD
AND OTHERS.

C. A.

1950

Apr. 25.

Bankruptcy—Leaseholds vested in bankrupt—No disclaimer by trustee—Official Receiver's succession to trusteeship in 1943—Application in 1949 for order extending time for disclaiming leases—Jurisdiction—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 54, sub-s. 7; s. 109, sub-s. 4.

Evershed M.R.,
Asquith and
Jenkins L.JJ.

In 1941, when an adjudication order was made against her, the bankrupt owned two leasehold properties. They were held under leases subject to onerous conditions. A private individual was appointed to be her trustee in bankruptcy. He did not disclaim the two leasehold interests. In 1943 the original trustee was discharged and the Official Receiver succeeded *virtute officii* to the trusteeship. The Official Receiver did not become aware of the existence of the leaseholds until 1946. It was not, however, until 1949 that he applied under s. 54, sub-s. 7, of the Bankruptcy Act, 1914, for an order extending the time in which he might exercise his right to disclaim the leases. The registrar refused to make an order, holding that, on the true construction of s. 54, sub-s. 7, there was no jurisdiction to extend the time limited for exercising the power of disclaimer.

Held, that the special power of disclaimer conferred on the Official Receiver by sub-s. 7 of s. 54 of the Bankruptcy Act, 1914, was only exercisable within the period of twelve months there laid down; and that there was no jurisdiction in the court to extend the time for disclaimer where it had not been exercised by the Official Receiver within that period.

The general power conferred by sub-s. 4 of s. 109 of the Act of 1914 to extend the time for doing acts does not apply to s. 54, for the specific provisions in the latter section enabling the court to extend the time within which a trustee must disclaim, displace the more general provisions of s. 109.

In re Price; Ex parte Foreman (1884) 13 Q. B. D. 466 and *In re Baker* (1891) 8 Morr. 116, considered.

Per Evershed M.R. Semble. Sub-section 7 is an exhaustive statement of the rights of disclaimer of the Official Receiver succeeding a trustee, and he cannot apply for an extension of time under sub-s. 1.

APPEAL from Mr. Registrar Cunliffe.

In February, 1941, Mrs. Gladys Knight was adjudicated bankrupt, and a private individual, one Phillips, was then appointed to be her trustee in bankruptcy. At the date of the receiving order two leasehold properties were vested in the bankrupt. One was held under a lease dated February 22, 1882, for a term of 80 years from March 25, 1882, and the

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second was held under a lease dated May 11, 1860, for a term of 99 years from June 24, 1859. Both leases were subject to certain onerous covenants and provisions. The original trustee in bankruptcy did not exercise his power to disclaim these leases. He was discharged in 1943, and the Official Receiver then succeeded *virtute officii* to the trusteeship. He became aware of the existence of the leaseholds in 1946. It was not, however, until 1949 that he applied under s. 54, sub-s. 7, of the Bankruptcy Act, 1914, for an order extending the time within which he might exercise his right of disclaimer.

The first respondent to the application was Mrs. M. S. Hubbard, in whom was vested the freehold reversion expectant on the first lease, the second respondent was Mrs. E. M. Rogers, in whom was vested the freehold reversion expectant on the second lease. The third respondents were the Magnet Building Society to whom the bankrupt had mortgaged both premises.

Mr. Registrar Cunliffe dismissed the application. He held that there was no jurisdiction to extend the time of disclaimer limited by sub-s. 7 of s. 54 of the Bankruptcy Act, 1914 (1).

(1) Bankruptcy Act, 1914, s. 54, sub-s. 1: "Where any part of the
 "property of the bankrupt con-
 "sists of land of any tenure
 "burdened with onerous
 "covenants, of shares or stock in
 "companies, of unprofitable con-
 "tracts, or of any other property
 "that is unsaleable, or not readily
 "saleable, by reason of its binding
 "the possessor thereof to the
 "performance of any onerous
 "act, or to the payment of any
 "sum of money, the trustee,
 "notwithstanding that he has
 "endeavoured to sell or has taken
 "possession of the property, or
 "exercised any act of ownership
 "in relation thereto, but subject
 "to the provisions of this section,
 "may, by writing signed by
 "him, at any time within twelve
 "months after the first appoint-
 "ment of a trustee or such
 "extended period as may be
 "allowed by the court disclaim
 "the property:

"Provided that, where any such

"property has not come to the
 "knowledge of the trustee within
 "one month after such appoint-
 "ment, he may disclaim such
 "property at any time within
 "twelve months after he has
 "become aware thereof or such
 "extended period as may be
 "allowed by the court."

Sub-section 4: "The trustee
 "shall not be entitled to disclaim
 "any property in pursuance of
 "this section in any case where an
 "application in writing has been
 "made to the trustee by any
 "person interested in the pro-
 "perty requiring him to decide
 "whether he will disclaim or not,
 "and the trustee has for a period
 "of twenty eight days after the
 "receipt of the application, for
 "such extended period as may be
 "allowed by the court, declined
 "or neglected to give notice
 "whether he disclaims the pro-
 "perty or not; and, in the case
 "of a contract, if the trustee,
 "after such application as afore-

The registrar in the course of his judgment said: "The words of s. 54 of the Act of 1914 are categorical and precise, and it is, in my opinion, on the phraseology of this section and on this alone that this question falls to be decided. So far as the power to disclaim by a trustee is concerned, that section expressly provides for an extension by the court in proper circumstances of the twelve-months limit imposed, whereas, when it comes to providing expressly for the situation on which the earlier legislation was silent, by creating a power of a like character for an Official Receiver who acts in succession to a trustee, sub-s. 7 carefully limits such power by saying that it 'shall be exercisable only' within twelve months after the Official Receiver has become trustee. Notwithstanding the submission by counsel on behalf of the Official Receiver that, in spite of this careful differentiation, I am entitled by virtue of the general terms of s. 109 to override the limitations which have been imposed in sub-s. 7 and to read the sub-section as though the words 'but such power of disclaimer shall be exercisable only' had been omitted therefrom, I do not think I am entitled to do this and I am satisfied that the sub-section ought to be given the meaning which, on the face of it, it clearly bears, and must hold that s. 109, sub-s. 4 cannot be treated as giving to the court a discretion to extend time limits save where there is nothing in the original section imposing the limit to imply that it shall not be extendable. Accordingly, the application must be dismissed."

The Official Receiver appealed. The first respondent reversioner, who had not appeared before the registrar, was

said, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it."

Sub-section 7: "Where, on the release removal resignation or death of a trustee in bankruptcy, an official receiver is acting as trustee, he may disclaim any property which might be disclaimed by a trustee under the foregoing provisions, notwithstanding that the time prescribed by this section for such disclaimer has expired, but such power of disclaimer shall be exercisable only within

"twelve months after the official receiver has become trustee in the circumstances aforesaid, or has become aware of the existence of such property, whichever period may last expire."

Section 109, sub-s. 4: "Where by this Act, or by general rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose."

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C. A. now before the court. The second and third respondents were not represented.

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Muir Hunter for the Official Receiver. These leasehold interests were not disclaimed in the first instance by the original trustee in bankruptcy under the power conferred by sub-s. 1 of s. 54 of the Act of 1914 owing to the fact that their existence was overlooked. The Official Receiver only became aware of the existence of these leaseholds in 1946. Why the leaseholds were not then disclaimed by the officer in the Official Receiver's department in charge of the matter has not been ascertained. It is submitted that the court has power to extend the time limited by sub-s. 7 of s. 54 within which the Official Receiver may disclaim the leaseholds.

It is submitted, first, that, on the true construction of s. 54 as a whole, the court had jurisdiction to extend the time limited by sub-s. 7. There is no ground for distinguishing between the position of the Official Receiver and that of an ordinary trustee in bankruptcy. The Official Receiver is a trustee, and he could apply under sub-s. 1 to have the time thereby limited for disclaimer extended. If he had applied under sub-s. 1, there would have been no need for him to apply under sub-s. 7. On a reading of the section as a whole, the court has jurisdiction to extend the time under sub-s. 7. Secondly, it is contended that such a power is conferred on the court by sub-s. 4 of s. 109. This sub-section, which is in general terms, confers power on the court to extend the "time for doing any act or thing" limited under the Act. Sub-section 4 of s. 109 is identical in terms with sub-s. 4 of s. 105 of the Bankruptcy Act, 1883. It was held that the old s. 105 conferred power on the court to extend the time for disclaimer given to trustees in bankruptcy by s. 55 of the Act of 1883, now s. 54 of the Act of 1914: *In re Baker* (1); *In re Price* (2).

R. S. Lazarus, for the reversioner, was not called on.

EVERSHED M.R. [after stating the facts]. The position of the Official Receiver when he succeeds to a private trustee is expressly provided for by sub-s. 7 of s. 54. The questions debated, and determined by the registrar, were, briefly, these: whether the right to disclaim conferred upon an Official Receiver by sub-s. 7 is, according to the proper construction of that sub-section, limited in point of time

(1) (1891) 8 Morr. 116.

(2) (1884) 13 Q. B. D. 466.

strictly to the twelve-months period stated in the sub-section ; second, and assuming that it is by sub-s. 7 itself so limited, whether, by the general provisions of s. 109. sub-s. 4, an overriding power is given to the court in the exercise of its discretion to extend the time within which such a right of disclaimer may be exercised.

It was in November, 1943, that the succession (if I may use the phrase) of the Official Receiver occurred. The application for a day to be fixed to hear his application to disclaim was made on January 25, 1950. In that very considerable period of time a number of things happened. One of them was the partial wrecking of the Bankruptcy Offices by enemy action in or about June, 1944. But it appears from the judgment of the registrar that, at any rate in 1946, the Official Receiver did become aware in fact of the existence of these leaseholds and of their onerous nature. No attempt, however, was made until January 25, 1950, to relieve the bankrupt's estate of this burden.

Mr. Registrar Cunliffe, at the end of his judgment, stated that, assuming a discretion existed to extend the time of disclaimer, he did not think there would be any serious obstacle to its exercise. He observed that no objection had been raised by other persons interested. The position in this court is not quite the same as it was before the registrar, because the first respondent, the person interested as landlord or reversioner in respect of one, at any rate, of the leases, is now represented, and, I assume, is represented in order to oppose the Official Receiver's application. I also observe that in the registrar's judgment there occurs this sentence : " For some reason which does not appear the Official Receiver " did not himself disclaim."

On the view which I take, it is not necessary to decide the question of discretion, and I wish to say but little about it. But it was indicated, though I think somewhat slightly, by Mr. Muir Hunter, that, owing to the ramifications of departmental life in the Board of Trade, it never would be possible to state how it was, or by whose human agency it came about, that a statutory right to disclaim was not more expeditiously exercised. If that is true, it is a pity, but it is no reason, that I can see, for extending any discretionary powers the court may have. If the court is asked either by a private citizen or by a Department of State to exercise a discretion in his or its favour, *prima facie*, the same or similar

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I only refer to the matter because it was also suggested—and I reject the supposition as I think it unsound—that because a Department of State is maintained out of the public funds there should be some tendency to extend privileges in the way of time or otherwise which would not be extended to private persons, regardless of the fact that other individuals might thereby be affected as regards their rights.

I therefore say no more on that aspect of the case except to assume that Mr. Muir Hunter is right in saying that, if it were necessary to investigate the matter further, the Official Receiver would take steps to make a further and fuller investigation. It comes to this, in construing the relevant section, that no account can be taken of the fact that we are here dealing with a somewhat impersonal entity called the Official Receiver, who is really, as I understand it, an emanation of a department rather than a specific individual.

I return, therefore, to the question in hand, which is whether there exists, either by the terms of the sub-section itself or by the joint operation of the sub-section and s. 109, sub-s. 4, any discretion in the circumstances of this case in the court. The registrar came to the conclusion that there did not, and I entirely agree with his conclusions and with the reasons which he so cogently expressed.

But since the matter is one which apparently has not previously come before the court, no doubt for reasons not difficult to imagine, and Mr. Muir Hunter having invited our view, I will add briefly a statement of my reasons. Where a trustee is appointed in the ordinary way, upon adjudication, whether that trustee is the Official Receiver or a private person, sub-s. 1 operates; and it provides that, in the case of onerous property, speaking generally, he may, notwithstanding that he may have tried to sell it or exercised acts of ownership in respect of it, “subject to the provisions of this section, . . . by writing signed by him, at any time within twelve months “after the first appointment of a trustee”—and I note that the period begins to run from the first of such appointments—“or such extended period as may be allowed by the court, “disclaim the property.” Then there is a proviso which gives, in effect, an extended period where the property does

not come to the knowledge of the trustee; and again the specific time mentioned has the addition "or such extended period" as may be allowed by the court."

I propose to consider the section first as we now find it, and without regard to its history. I can pass over the intervening sub-sections, save to observe that in sub-s. 4 (which concerns the case where a trustee is called upon to make up his mind with regard to onerous property) the trustee is given twenty-eight days in which to disclaim "or such extended" period as may be allowed by the court." Sub-section 7 provides as follows [his Lordship read the sub-section and continued.] It is to be noted that this sub-section applies to the case, and only to the case, where the Official Receiver succeeds to the trusteeship by reason of release, removal, resignation or death. It is a succession regarding which he has no option and which automatically descends upon him; and it is his duty in his official capacity to carry out the burden of the trusteeship accordingly.

In each case the question arises: has the time prescribed by this section for the disclaimer of a particular property expired, or has it not? That ought to be a question easy to answer, for, save in exceptional circumstances, the period prescribed by sub-s. 1 is twelve months from the first appointment of a trustee, and if that twelve months has expired, and if no application has been made for its extension, or if such an application has been made and the time granted by way of extension also has expired, then in each one of those cases it is clear that, quoad the particular property, the time prescribed by the foregoing provision has expired. Prima facie, therefore, the right to disclaim will have gone. I draw attention again to the fact that the time begins to run under s. 54, sub-s. 1, from the first appointment of a trustee.

But sub-s. 7 creates on the Official Receiver's succession a new right, which is exercisable notwithstanding that the time within which the earlier right might have been exercised has passed. It gives to the Official Receiver a right to disclaim, but it gives it in terms which seem to me as a matter of English to mean—and I am so far only considering sub-s. 7—that the right is to be exercised within a specific time, and that there is no question of an extension of that time. The words are "but such power shall be exercisable only within twelve months after the Official Receiver has become trustee." The sub-section further provides that, in the event of his

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subsequently becoming aware of the existence of such property, his right shall be exercised within twelve months of that date. Those words to my mind make it plain that under s. 54, sub-s. 7, unlike s. 54, sub-s. 1, there is no question of any extension: it is a strictly limited period. Sub-section 7 creates and confers a new right, but it strictly limits its exercise in point of time, perhaps for obvious reasons.

The present appeal is only under s. 54, sub-s. 7. A possible point which the Official Receiver might take was said to be that he was a trustee, and therefore could apply, though the period had long since passed, for an extension of the statutory right of disclaimer which is conferred on all trustees by sub-s. 1. That matter is not before us, and it is therefore not right for me to express a concluded view upon it. But I will indicate that, as at present advised, I do not accept that suggestion. It seems to me, *prima facie*, that sub-s. 7 is an exhaustive statement of the rights of disclaimer of the Official Receiver succeeding in these circumstances. He has not an additional right in the background under sub-s. 1. Had it been intended that he should have such a right, I think that s. 54, sub-s. 7, would almost certainly have opened with some such words as "Without prejudice to any other rights under this section "of the Act." That question, however, I need not pursue. Mr. Hunter founds his argument on this part of the case, as I follow it, on the view that, since the time prescribed by sub-s. 1 of s. 54 for the exercise of the general power to disclaim is always liable to be extended, and extended *ex post facto*, therefore, to make sub-ss. 1 and 7 fit together, as he would like to do, a general power ought to be assumed to extend the time for disclaimer conferred by sub-s. 7; or, to put it in another way, that the only object of stating the twelve months' period in sub-s. 7 was to show that the Official Receiver, without making any application, and notwithstanding that time under sub-s. 1 had expired, could during that period of his own motion disclaim. The argument has the merits of ingenuity, but I cannot accept it. It seems to me that the language of sub-s. 7 in its context is too plain to admit of it.

As for the second part of the argument, which rests upon s. 109, sub-s. 4, again I will consider it without regard, for the moment, to any matter of history. Section 109 is the first of a series of sections which has the cross-heading "Procedure." Sub-section 1 concerns the costs of certain proceedings, sub-s. 2 the adjournment of proceedings by the court, and sub-s. 3

amending proceedings by the court. By sub-s. 4: "Where
 "by this Act, or by general rules, the time for doing any act
 "or thing is limited, the court may extend the time either
 "before or after the expiration thereof, upon such terms,
 "if any, as the court may think fit to impose." Sub-section 5
 refers to taking evidence: it may be taken "either viva voce,
 "or by interrogatories, or upon affidavit," or otherwise. Mr.
 Hunter says that sub-s. 4 is in terms perfectly general, and
 that, since s. 54 concerns acts or things which have to be done
 within a limited time, namely, within twelve months, it follows
 that the general terms of s. 109, sub-s. 4, confer, not-
 withstanding anything else in the Act, a power on the court
 to extend that time limited by sub-s. 7 of s. 54.

Section 109, as stated, concerns purely procedural matters;
 but the right to disclaim is something which is not aptly
 described as purely procedural. That argument, however,
 would of itself be insufficient, for in *In re Price* (1) and *In re*
Baker (2) the corresponding s. 105, sub-s. 4 of the Act of
 1883 was held to be applicable to the existing provisions in
 regard to disclaimer, though the argument that s. 105 was
 procedural was, of course, as available then as it is now.

But it seems to me that there is another answer to Mr. Muir
 Hunter's point. The sections in any Act of Parliament must
 be construed together. In the section with which we are
 particularly concerned, s. 54, a specific power is given to the
 court to extend the time under sub-s. 1 within which an
 ordinary trustee, if I may use the phrase, may disclaim. For
 reasons already explained that power of extension is
 significantly, and I think deliberately, omitted in the case
 of the Official Receiver succeeding in accordance with the
 terms of sub-s. 7.

If s. 109 were of general application, then the addition in
 sub-s. 1 of that section and likewise in sub-s. 4 of a specific
 power to extend the time would be wholly otiose. I therefore
 construe s. 109, sub-s. 4, as having to be read subject to the
 specific provision to the contrary which upon a proper con-
 struction may be found in other sections of the Act. So
 reading ss. 54 and 109 together, I think that sub-s. 4 of s. 109
 does not apply to cases within the four corners of s. 54 itself.

I will refer to the history of the matter in order to see whether
 the view which I take, and what I hold to be the ordinary
 and proper meaning of the words now found in the Act of

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(1) 13 Q. B. D. 466.

(2) 8 Morr. 116.

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1914, can be affected by historical considerations. For that it is necessary to go back to the Bankruptcy Act, 1883. Section 55, sub-s. 1 of that Act contains a power for the trustee to disclaim. That sub-section differed, however, in two respects from the present s. 54, sub-s. 1. First, the time within which a trustee could disclaim onerous property was, instead of twelve months from the time I have stated, three months only. Further, there did not appear in sub-s. 1 of s. 55, any right in the court to extend the three-month period. Section 105 of the Act of 1883 was, so far as is relevant, in exactly the same terms as s. 109 of the existing Act. Therefore, looking at those two provisions together, and there being no specific reference to any extension of time in sub-s. 1 of s. 55, it was possible for the court to conclude that the time limited by s. 55 could be extended by the application of the general provisions of s. 104. That I understand to be the effect of the two cases of *In re Baker* (1) and *In re Price* (2) to which the Registrar referred.

There came a statutory amendment of the Act of 1883 by the Bankruptcy Act, 1890, section 13 of which altered s. 55, sub-s. 1 in two respects. As a result of that alteration the sub-section took the form, more or less precisely, which it bears to-day. In the first place, the period of three months specified in s. 55, sub-s. 1 of the old Act became twelve months, the period which we now find in s. 54 of the Act of 1914. Further, Parliament expressly added a power to the court in s. 55 to extend the statutory period of twelve months, and, by so doing, it seems to me, must have proceeded on the view that that special power was needed to extend the time, or, at any rate, on the view that, so far as the extension of time to disclaim was concerned, power should be derived from the terms of s. 55 itself and not from any application of some general provision elsewhere in the Act.

The bankruptcy provisions, therefore, in 1890 took that form and remained in that form, so far as is relevant, until 1913. During that appreciable period of time, in the event of the release, resignation, death or removal of a trustee and the accession to office of the Official Receiver, no additional powers were given by the Act to the Official Receiver. It may, therefore, well have been that there was a lacuna which required filling up. By s. 19 of the Bankruptcy and Deeds of Arrangement Act, 1913, what is now sub-s. 7 of s. 54, of the

(1) 8 Morr. 116.

(2) 13 Q. B. D. 466.

Act of 1914 was inserted in that section. Whether or not before that amendment an Official Referee succeeding in the circumstances indicated could then have said that the twelve months had "no doubt gone, but that he was a trustee and "could apply for an extension", sub-s. 7 made a special provision that, from the time when he was appointed, or, alternatively, from the time he became aware of the onerous leaseholds, without any application at all he could himself exercise a new right conferred upon him of disclaiming. It seems to me that, in conferring that new right, Parliament was precise in indicating that it was to be exercised—and I can do no better than use the words which Parliament used—only within the twelve months limited by the section.

It seems to me that there is nothing in the history which I have recited which alters or affects in any way the ordinary construction and meaning of the various sub-sections to which Mr. Hunter has referred us. I therefore still come to the same conclusion, namely, that s. 54, sub-s. 7 of the Act of 1914 gives to the Official Receiver succeeding in circumstances such as exist here a statutory right to disclaim; but that that right must be exercised within the period of twelve months from one of the two termini indicated; and that, if it is not so exercised, there is no power in the court to extend it, either under that sub-section or by reference to the general language of s. 109, sub-s. 4.

For these reasons, I agree with the view of the registrar, and the appeal fails and must be dismissed.

ASQUITH L.J. I agree. Section 109, sub-s. 4 gives a general power to extend the time for doing acts, and a disclaimer is an act. But there is a special section, s. 54, concerned specifically with disclaimers, and one sub-section of it refers to the precise type of disclaimer involved in this case—that is, a disclaimer by an Official Receiver who becomes trustee on the release of the original trustee. The ordinary trustee could under sub-s. 1 of s. 54 disclaim within twelve months after his appointment as trustee, or such extended time as might be allowed by the court. By contrast with this, sub-s. 7 provides, in effect, that, in the particular case of the Official Receiver's becoming trustee on the release of the original trustee, no extension of the twelve-month period shall be allowed. In those circumstances this specific provision (which exactly fits the facts of the present case) must, I think,

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C. A. necessarily displace the more general provisions of s. 109.
1950 In my view the judgment of the registrar is unassailable,
and the appeal must be dismissed.

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JENKINS L.J. I agree, and I am content to adopt the very clear reasons given by the registrar for his conclusion. I should perhaps add that, as regards the scope of s. 109, sub-s. 4 as to extension of time, I prefer to found myself on the construction of this particular s. 54 and on the specific provisions which it contains, rather than on the limitation, suggested by my Lord, of s. 109, sub-s. 4 to purely procedural matters. I think that the line between matters purely procedural and matters of substance is one which it might well be difficult to draw. For my part, therefore, I prefer to found myself strictly on the construction of this particular section. Looking at the matter from that point of view, I think that the express reference in sub-s. 1 and also in sub-s. 4 to the extension of time by the court, coupled with the absence of any such reference in sub-s. 7, and the categorical statement in that sub-section to the effect that such power of disclaimer shall be exercisable only within twelve months after the Official Receiver has become a trustee, really makes it abundantly plain that the general power conferred by s. 109, sub-s. 4 has no application to s. 54, sub-s. 7. I should add that the language of sub-s. 7 has also this difference from the language of sub-s. 1: sub-s. 1 says that the trustee may within the period prescribed disclaim the property. Sub-section 7 confers a special power of disclaimer on the Official Receiver in the circumstances mentioned but says that that power shall be exercisable only within the period of twelve months. A power is thus in terms created with a limitation upon it, whereby it endures only for twelve months and thereafter ceases to be exercisable, or, in other words, ceases to exist. I think that the form in which the limitation is put in that respect also bears out the conclusion at which the court has arrived. I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Tarry, Sherlock and King; Hughes-Narborough and Thomas.*

B. A. B.

LAND REALISATION CO., LD. v.
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Apl. 18.

Land—Compulsory purchase by government department—Service of notice and authorization on owner—Failure to enter into possession within the prescribed period—Service of second notice and authorization—Validity—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 & 10 Geo. 6, c. 49), s. 2, sub-ss. 2, 3—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 37, sub-ss. 3, 4.

A government department issued the requisite statutory authorization for the compulsory purchase of a piece of land under s. 2, sub-s. 2 of the Acquisition of Land (Authorisation Procedure) Act, 1946, but failed to enter into possession until several days after the expiration of the period of three months within which, under s. 2, sub-s. 3, they should have done so.

Held, that they were not thereby precluded from adopting the same statutory procedure a second time for the compulsory purchase of the land, even though they proceeded to do so at once, so long as, on the second occasion, as on the first, the minister "satisfied" himself, as required by s. 2, sub-s. 2, of the Act, as to the expediency of his action.

WITNESS ACTION.

On June 22, 1948, the Postmaster-General served notice on the plaintiff company under the Act of 1946 in respect of their land. On September 28, 1948, he gave an authorization under s. 2, sub-s. 2, of the Act of 1946, as amended by s. 37, sub-s. 4, of the Act of 1947, to purchase the land compulsorily. On January 3, 1949, the Postmaster-General, in purported pursuance of the authorization, entered on and took possession of the land, thus failing to do so within the statutory period, in contravention of sub s. 3 of s. 2 of the Act of 1946 (1). On May 31, 1949, the Post Office delivered up possession of the land to the plaintiffs.

On July 14, 1949, the Postmaster-General served on the plaintiffs a notice to the same effect as that of June 22, 1948; on August 27, 1949, he gave an authorization to the same

(1) Acquisition of Land (Authorisation Procedure) Act, 1946, s. 2, sub-s. 3: "At any time not earlier than seven days nor later than three months after the giving of an authorization under this section	"the acquiring authority may enter on, and take possession of, the land to which the authorization relates notwithstanding that the purchase of the land has not been completed."
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effect as the former authorization; on October 12, 1949, he again entered on and took possession of the land.

On October 27, 1949, the plaintiffs issued their writ, and claimed, by their statement of claim, a declaration that the authorization made by the Postmaster-General on August 27, 1949, was invalid, and that the plaintiffs were entitled to possession, mesne profits or, in the alternative, damages in respect of wrongful occupation by the defendant from January 3 to May 31, 1949, and from October 12, 1949, until delivery of possession to the plaintiffs, and damages for wrongfully entering the plaintiffs' land and depositing chattels and executing works thereon.

The only question argued was whether the defendant was entitled, after the previous machinery for the acquisition of the land had been rendered abortive, to bring it into operation again by repeating the procedure and issuing a second notice and authorization and re-occupying the land. His good faith was in no way questioned.

Russell K.C. and *Victor Coen* for the plaintiff company. It is not possible to adjust the position on behalf of the Postmaster-General by merely extending the time. Having once let the three-month period elapse, he has no power merely to repeat the previous procedure. [Counsel referred to *Ellen Street Estates, Ltd. v. Minister of Health* (1)].

Ungoed-Thomas K.C. and *G. H. Newsom* for the Postmaster-General. Sub-section 3 of s. 2 of the Act of 1946 does not cease to have effect because the process is repeated. The owner cannot be kept in suspense for an indefinite length of time, and the Minister must act bona fide with regard to the urgency and need for the order; but that is the end of the matter so far as he is concerned. Sub-section 3 is a permissive sub-section; there is nothing exclusive about it and there are no express words in it which cut down the effect of sub-s 2.

Russell K.C. replied.

ROMER J. [After stating the facts and reading the material statutory provisions and statement of claim continued:] The defendant is not concerned to dispute that his original occupation was unprotected so far as it rested for its validity on the authorization of September 26, 1948, and he says that he is quite prepared to submit to paying any damages that

may have resulted to the plaintiffs by reason of his having entered into possession without proper authority. This is the subject matter of a claim for damages for trespass, and will be referred to chambers for inquiry. But he contends that the second authorization, that of August, 1949, was perfectly in order, and he relies on it as establishing a title to possession from October 12, 1949.

The matter came before me last term on the application of the defendant to have the whole case disposed of on a point of law, and certain attempts were made, on both sides, to formulate precisely what the question of law should be, which, it was thought, would determine the whole of the litigation between the parties, apart from the question of damages for trespass. No satisfactory point of law emerged, but the plaintiffs did amend their statement of claim by pleading as follows: "The defendant did not enter on or take possession " of the plaintiffs' said land in accordance with sub-s. 3 of " s. 2 of the Acquisition of Land (Authorisation Procedure) " Act, 1946, or otherwise, until more than three months after " the said authorization dated September 28, 1948. Neither " on July 14, 1949 (the date of the said purported second " notice) nor on August 27, 1949 (the date of the said purported " second authorization) had there been since June 22, 1948 " (the date of the said first notice) or since September 28, " 1948 (the date of the said first authorization) any change in " the circumstances relevant to the decision of the Postmaster- " General to give either of such notices or either of such " authorizations."

With regard to that, the defendant put in an amended defence as follows: "The defendant makes no admission with regard " to the second sentence of the said paragraph and will object " that the allegations in the said sentence are irrelevant and " that under s. 2 (2) of the Acquisition of Land (Authorisation " Procedure) Act, 1946, as amended by the Town and Country " Planning Act, 1947, it is within the exclusive discretion of " the Postmaster-General, into whose exercise of such discretion " this honourable court will not inquire, to determine whether " there is any such circumstance or absence of circumstance " as alleged in the said second sentence and whether it is " relevant to the Postmaster-General's decision referred to in " the said second sentence."

Before me, no evidence has been called at all. The question of damages, as I say, is to be referred to chambers.

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Accordingly, the only matter which has been discussed before me is a pure question of law arising on the construction of the legislation to which I have referred, and more particularly sub-ss. 2 and 3 of s. 2 of the Act of 1946.

Mr. Russell, on behalf of the plaintiffs, pointed out that, in the ordinary type of compulsory purchase, there are considerable safeguards, which have become stereotyped, in the interests of the owner of the land affected. In particular, there is, in general, either a public inquiry or a special hearing of objectors, and that is followed by a report, which is considered by the minister who, with all the assistance that is thus offered to him, eventually arrives at a decision.

Another form of compulsory purchase is that authorized by s. 2 of this Act of 1946: it is a method of procedure which does not give to the persons affected the safeguards which the ordinary procedure affords, because there is no public inquiry and the only opportunity which a person affected has to make known his views is to submit written representations, which can be taken into account but which may not have the same force as oral representations. Mr. Russell says that this is a special form of acquisition, as appears from the fact that it was only to last for a period of five years and was confined in its intendment to the acquisition of land in urgent cases, and that an exercise of powers under so special an authority as that should be jealously scrutinized by the court.

Mr. Russell pointed out that one of the principal safeguards in the section which introduces this special power and confers it is that which requires entry into possession not later than three months after the giving of an authorization, and he says that the object of that was, presumably, to protect the owner of property, who would know where he stood in the matter and would not be left wondering indefinitely whether his land was to be taken or not.

Then, applying those considerations to the facts of this present case, he said that the Postmaster-General was seeking, in effect, to extend the three-month limit, which he had by inadvertence overstepped, by setting in motion this machinery for the second time. But his arguments went rather further than that in the first instance, because he said that his first proposition, although it was not necessary in this case to establish it, was that the Postmaster-General cannot use this procedure twice, but must be content with either doing so once or not doing so at all.

That view imposes a limitation on the apparent powers of the minister which I am unable to accept. It would result, if ever a mistake were made, as it was in the present case, in immunizing thereafter, for ever, the land which a department had wanted, but which, through some oversight, the minister failed to obtain. I see no warrant for accepting such a qualification as that.

Then, secondly, it was said that the minister cannot use this procedure twice unless the circumstances have changed ; and finally, and this is the point which is nearest home, that there is no power in the minister merely in substance to extend the period of three months, prescribed by sub-s. 3 of s. 2. It was said that here the minister was quite obviously seeking a means of extricating himself from the difficulty which had arisen from the fact that possession was not taken, as it should have been taken, within three months of the first authorization ; and that, in order to rectify what had gone wrong, he had brought into play this machinery all over again in such a way as to reduce the whole position to something approximating to a farce.

Mr. Russell developed his argument by saying that if the defendant were right he could then sterilize land for an indefinite period of time by a series of repeated authorizations without paying compensation to the landowner, who would not know whether he could regard himself as free to develop the property himself or to sell it. The argument for the plaintiffs is that that course, on a fair construction of s. 2 of this Act, is not open to the defendant or to any government department who are confirming authorities to take.

It was argued that a government department might get the best of both worlds by serving notices in regard to two plots of land and renewing them as and when time ran out, and in the meantime deciding which one they really wanted to have. It is legitimate to make criticisms of that kind, but the legislature in conferring powers on a minister is conferring them on a person who will presumably use those powers bona fide, in a responsible spirit, in the true interests of the public, and in furtherance of the objects for the attainment of which the powers were conferred.

I approach this legislation mindful of what may happen if I accept the defendant's argument, though confessing that I think that most of the possibilities which were mentioned are extremely unlikely to arise in practice.

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Sub-section 2 of s. 2 provides: "Where during the "period aforesaid"—that is the period of five years—"the "Minister of Transport"—for "Minister of Transport" I read the "Postmaster General"—"is satisfied that it is "expedient that he should purchase any land under any "enactment mentioned in para. (b) of sub-s. 1 of the foregoing "section, or the Board of Trade are satisfied that it is expedient "that they should purchase any land under the Distribution "of Industry Act, 1945, and the Minister or Board are satisfied "that it is urgently necessary in the public interest that the "Minister or Board should be enabled to obtain possession "of the land without delay, the Minister or Board may, in "lieu of being authorized to purchase the land in accordance "with the provisions of the foregoing section or of the said "Act of 1945, be so authorised, subject to the provisions of "the Third Schedule to this Act, by an authorization in writing "given by the Minister or Board under this sub-section."

The second authorization, that of August 27, 1949, now challenged, recites that "the Postmaster-General is satisfied "that it is expedient that he should purchase the land in "question and that it is urgently necessary in the public "interest that he should be enabled to obtain possession of "the land without delay."

The plaintiffs do not desire to contend that they can question the finding that the Postmaster-General was in fact "satisfied"; and it is well settled that, where a statutory provision empowers a minister to do something if he is satisfied with regard to a certain state of affairs, then a statement by him that he is so satisfied will be accepted in these courts.

Consequently, I approach the matter in this way: it is not disputed that on August 27, 1949, the Postmaster-General was satisfied in the sense indicated. Unless I can find something which cuts down the *prima facie* and ordinary meaning of sub-s. 2 of s. 2, I am bound to hold that the conditions precedent to the issue of this authorization existed. What I am invited to do by the plaintiffs is to say that, although it is not necessary, and indeed may not be practical, to read into sub-s. 1 any express or necessarily implicit language of qualification, nevertheless I cannot accept the argument of the Postmaster-General in this case without in effect giving the go by to the spirit, if not the letter, of sub-s. 3; because, as already stated, it was submitted that if that argument were right the government department could go on over and over

again acting in such a way as to extend indefinitely the time limit imposed.

I do not think that there is anything like enough in the requirements of sub-s. 3, to impose any such limitation as is suggested on the powers conferred by sub-s. 2. As I see it, all that I have to be satisfied about is that, at the date when the authorization emanated from the Postmaster-General, he was satisfied as to the matters about which he had to be satisfied before that authorization could issue.

Once it has been established to my satisfaction that those conditions precedent have been fulfilled, it appears to me that the matter is at an end, and none the less so because the effect of the language used may be to extend the time in the sense that the minister, although he has not observed the time limit imposed by sub-s. 3, is getting his way by having another opportunity of putting himself in order. It is not a case of extending the time limit, but of starting the machinery again : representations in writing have to be sent in again, and they have to be re-considered. At the time when the second authorization is given—if in fact it is given—the minister has to be just as satisfied about the issues on this second occasion as he was on the first occasion.

Seeing that the Postmaster-General failed to carry into effective operation the first time the implementation of these powers in relation to this land, and that he started again or was prompted to make a second attempt, then, provided that he again conformed, as no doubt he did on the first occasion, with the requirement of being satisfied, it seems to me that I should be introducing a limitation on the exercise of his powers, which not only is foreign to the language used, but also would appear to be foreign to the conception in relation to this kind of matter which emanates from s. 32, sub-s. 1, of the Interpretation Act, 1889.

I might really sum the matter up by saying that I do not think that any real point of construction arises here at all : the language used seems to be reasonably plain. Provided always that the minister does what he is required to do before the authorization can issue, the fact that he has tried to acquire land already is no obstacle to his task in trying again, even though he tries immediately after the failure of his first endeavour.

There will be no declaration that the authorization was valid, as there is no counter-claim asking for such a declaration.

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The plaintiffs succeed only to the extent of having an inquiry as to the damages which they sustained by reason of the wrongful occupation of their land by the defendant from January 3, 1949, to May 31, 1949, and for wrongfully entering the land.

Judgment accordingly.

Solicitors: *Hyman Isaacs, Lewis & Mills, for Burt Brill & Edwards, Brighton; Sir Clement Hallam, Solicitor's Department, G.P.O.*

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WESTMINSTER CORPORATION v. HASTE.

[1948 W. 3060]

Company—Demand for payment of general rate—Rate unpaid—Receiver—Preferential debts—Misapprehension by receiver of duty to pay debt—Companies Act, 1948 (11 & 12 Geo. 6 c. 38) ss. 94, 319—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21) s. 2.

In 1940, a demand for the payment of a general rate was made by a local authority on a company, whose assets were in the possession of a receiver appointed by debenture holders. In 1948, the sum being still unpaid, an action was begun by the local authority against the receiver for damages in the amount of the unpaid rate. It was alleged and found that he had exhausted the assets of the company by paying creditors who were not entitled to preferential payment, without providing for the payment of the rate.

Held, that, although the claim, as being based on an action for tort, was barred by s. 2 of the Limitation Act, 1939, in respect of assets which were in the hands of the receiver more than six years before the issue of the writ, as there was a time in 1945 when he had sufficient money to satisfy the demand, he had committed a tort within the statutory period, and the claim succeeded.

Woods v. Winskill [1913] 2 Ch. 303 considered and applied.

There is no difference in legal effect between s. 107 of the Companies (Consolidation) Act, 1908, which required preferential debts to be "paid forthwith out of any assets coming to the hands of a "receiver" and s. 94 of the Companies Act, 1948, which re-enacts the provisions of first-mentioned section with the omission of the word "forthwith."

WITNESS ACTION.

London Piano & Radio, Ltd., were, during the period from

October 2, 1939, to November 28, 1939, the occupiers of premises in Oxford Street in the City of Westminster and were duly rated and assessed in respect of a general rate for that period in the sum of 63*l.* 9*s.* 8*d.*

On May 15, 1940, the defendant took possession of the company's assets, having been appointed receiver by debenture holders. On June 11, 1940, a petition was presented for the compulsory winding up of the company, and on June 24, 1940, a winding up order was made. On November 9, 1940, the appointment of the defendant as receiver and manager (in respect of which there had previously been a defect) was confirmed under the Courts (Emergency Powers) Act, 1939. A demand note in respect of the above-mentioned rate had, on July 9, 1940, been served on the defendant as receiver of the assets of the company.

On November 5, 1948, the sum being still unpaid, Westminster Corporation began an action against the defendant for 63*l.* 9*s.* 8*d.*, damages for breach of duty, alleging that he had exhausted the assets of the company by making payments to ordinary creditors, who were not entitled to preference, without paying or making provision for payment to the corporation of the sum in question; and that the corporation had thereby suffered damage to the amount of 63*l.* 9*s.* 8*d.*

J. A. Wolfe for the corporation.

Aronson K.C. and *Wigan* for the receiver.

DANCKWERTS J. [after stating the facts:] The contention is that the plaintiffs' claim for rates was a preferential debt under the Companies' Acts, and that the defendant has committed a tort by paying away assets of the company in other payments for trading and ordinary creditors without making provision for the plaintiffs' preferential claim.

The relevant sections for the purpose of this action are s. 78 of the Companies' Act, 1929, which is now replaced by s. 94 of the Companies' Act, 1948, and s. 264 of the Act of 1929 now replaced by s. 319 of the present Act, and without, I think, any substantial change. Section 78 of the earlier Act and s. 94 of the present Act are as follows: "Where, "in the case of a company registered in England, either a "receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or "possession is taken by or on behalf of those debenture

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“holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of part V of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.”

Section 319 of the present Act, which corresponds to s. 264 of the Act of 1929, provides that: “In a winding up there shall be paid in priority to all other debts—(a) the following rates and taxes,—(i.) all local rates due from the company at the relevant date, and having become due and payable within twelve months next before that date”—I was reading from the Act of 1948. There is a slight difference in the earlier Act in that parochial and other rates are referred to.

It appears in the present case from accounts which have been proved by a certified copy in accordance with the provisions of the Companies Act, and are before me, and by the evidence of the receiver himself, that the business of the company has been carried on by the receiver now for some ten years after the date of his appointment, and the date when the company went into liquidation, and that, while the receipts were rather less than the expenditure in the earlier years, at the end of the period from May 16, 1945, to November 15, 1945, the receipts exceeded the outgoings, and the receiver had, according to the accounts at any rate, on November 15, 1945, the sum of 91*l.* in hand. At the end of the next six-monthly period he had 60*l.* in hand, and on May 15, 1947, he had about 5*l.*, and since then, apparently, there has been a slight loss. The business of the company is, it seems, still being carried on.

The receiver in some respects clearly misunderstood his position. He did not understand his duties. He talked of the old company, and spoke as though he, as receiver, had created some entity, which was a different company from the company which carried on business before his appointment. In regard to that he was plainly mistaken: there was one company and one company only, and the business which the receiver has been and is carrying on is the business of the company and nothing else, even though the company is in liquidation. Therefore, all that he meant when he said that sort of thing was to indicate that he regarded the moneys

which he acquired as receiver in 1945 as moneys produced by the efforts of his own management rather than the efforts of those who previously managed the company before the period of his appointment. That may well have led him to take the wrong view of his duties in regard to payments which he ought to make in regard to the company's creditors.

There is a further point in the present case which is due to the long period of time which has elapsed since the company went into liquidation and the receiver was appointed. That is a question under the Limitation Act, 1939. So far as any assets of the company which were in existence when the receiver was appointed are concerned, and the payments that may or may not have been made out of those, and indeed as regards any assets in the hands of the receiver down to November 5, 1942, that is to say, six years before the issue of the writ in this action, which was issued on November 5, 1948, the claim of the plaintiffs for breach of the defendant's duty would appear to be barred, as being based on an action for tort, by s. 2 of the Limitation Act, 1939. Therefore the plaintiff's claim is really based on the fact that at some date subsequent to November 5, 1942, the receiver had in his hands assets of the company out of which he was bound to pay the plaintiffs' preferential claim.

So far as authority is concerned, there appears to be only one case which touches the point at all, the decision of Astbury J. in *Woods v. Winskill* (1). There a claim was based on the fact that, when the receiver took possession, the company's assets consisted of 61*l.* There was a claim under the Workmen's Compensation Act for 234*l.*, which was a preferential payment in the winding up of the company under the the existing Companies Act. The business of the company had been carried on, and the assets which the receiver took over on his appointment had been all expended in one way or another. It was claimed, therefore, that he was liable to pay plaintiff's preferential claim. It should be noticed that this case depended on s. 107 of the Companies (Consolidation) Act, 1908, which differed in respect of one word from the provisions of s. 78 of the Act of 1929 and s. 94 of the Act of 1948. The difference is this: when it refers to the payments which are to be made or not to be made by the receiver, the section says that preferential debts "shall be paid forthwith" out of any assets coming to the hands of the receiver or other

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“ person taking possession as aforesaid in priority to any claim “ for principal or interest in respect of the debentures.” The word “ forthwith ”, therefore, which appeared in that section, did not appear in the section corresponding to it in either of the two more recent Acts.

Mr. Aronson contends that the omission of the word “ forth- “ with ” is important, and indeed decisive, in regard to the plaintiffs’ claim in the present case. In the course of the argument in *Woods v. Winskill* (1), counsel arguing on behalf of the plaintiff said : “ Section 107 requires that the plaintiff’s “ preferential claim ‘ shall be paid forthwith out of any assets “ ‘ coming to the hands of the receiver ’,” thereupon Astbury J., observed : “ The section goes on ‘ in priority to any claim for “ ‘ principal or interest in respect of the debentures.’ Does “ it do more than give you priority over the debentures ” The reply to that question was : “ That construction gives “ no meaning to the word ‘ forthwith ’.” During the argument on behalf of the defendant, counsel said : “ It ”—s. 107— “ merely supplements s. 209 and gives preferential debts as “ against assets in the hands of a receiver the same priority that “ they would have in a winding up.” Astbury J., observed : “ That construction gives no meaning to ‘ forthwith ’ out of “ ‘ any ’ assets.” So that in the course of the argument, it would appear, the judge was attaching some importance to the presence of the word “ forthwith.”

In his judgment the judge made no reference to that word at all. He said (1) : “ Two views have been contended for “ before me as to the true construction of s. 107. (1.) That “ a receiver and manager with notice of a preferential claim “ is liable for damages in tort for exhausting the then assets “ of the company in making payments to ordinary creditors, “ without first applying the same or a sufficient part thereof “ in satisfying such preferential claim. (2.) That his only “ obligation thereunder is to avoid applying such assets, after “ notice, in actual payment of principal or interest to debenture- “ holders before satisfying thereout the preferential claim. “ There does not appear to be any direct authority on this “ point, but in my judgment the former is the correct view.” Then he assesses the damages. The judge was therefore holding that, under the section as it stood in the Act of 1908, there was not simply a negative obligation on the part of the receiver not to pay the debenture holders before paying

preferential creditors, but there was an obligation on him to pay out of the assets, on the date when he took over, the preferential creditors, and, if he did not make that payment and applied those assets towards other liabilities, he became liable in damages. Of course, it was correctly pointed out that Astbury J. was only discussing the assets which the receiver took over and that he was not concerned with moneys which might subsequently come to the hands of the receiver in the course of his management of the company. To that extent, therefore, this authority gives no assistance in regard to the present case.

I am therefore faced with two differences from the case before Astbury J. : first, the fact that, owing to the claim based on the earlier receipt being barred under the Limitation Act, the plaintiff bases his claim on the acquisition of later assets by the receiver ; and secondly by the omission of the word " forthwith." As regards the question whether any obligation is imposed on the receiver to pay, it seems to me that the authority of the case before Astbury J., is of some assistance in this respect. He held that there was an obligation imposed on the receiver to make the payment in priority to paying liabilities which had not such good claims, and that there was a liability if payment were not made. He does not seem to me to have placed very much reliance, so far as his judgment shows, on the existence of the word " forthwith," and I do not myself think that it makes any substantial difference to the effect of the section. There is a direction that the " preferential payments " referred to in the sections of the later Acts to be paid in priority to all other debts " shall be paid " out of any assets coming to the hands of the receiver or other " person taking possession as aforesaid in priority to any claim " for principal or interest in respect of the debentures." To my mind that is not simply a negative provision which means that the receiver is protected if he simply does not pay the debenture holders : it is a provision which requires him to pay the preferential creditors out of any assets coming to the hands of him as receiver. Therefore, it seems to me that, if he has had any assets out of which this payment could have been made, he is under a liability in tort to the plaintiffs.

In the present case, so far as the evidence before me shows, there was, at any rate in 1945, a moment when he had the sum of 91*l.* in his hands, more than sufficient to make the payment of 63*l.* 9*s.* 8*d.* to the plaintiffs. He did not make that payment, but he went on trading, incurred subsequent liabilities, and

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thus paid away the moneys in the course of his trading. It seems to me that, when he did that, he committed a tort, and that the plaintiffs' claim succeeds. There must be judgment for the plaintiffs for the amount claimed by them, with the usual result as to costs.

Judgment accordingly.

Solicitors : *Allen & Son ; Hamlins, Grammer & Hamlin.*

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In re EARL FITZWILLIAM'S AGREEMENT

PEACOCK AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[1949. P. 660.]

Revenue—Estate duty—Transfer of shares and policies to trustees in consideration of annuity—Bona fide transaction for full value—Death of annuitant—Claim for estate duty—Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2—Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), s. 11, sub-s. 1—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (c)—Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 44, sub-s. 1.

In 1934 securities to the value of 375,000*l.* were transferred by the deceased to the trustees of a special settlement in consideration of an annuity of 50,000*l.* a year. This transaction was agreed to be a bona fide sale for full value in money or money's worth. The settlement was made, on the marriage of the deceased's son, for the benefit of a class of persons which excluded the deceased (who took no benefit under the settlement) but which included his son. On the death of the deceased on February 15, 1943, the Inland Revenue Commissioners claimed that, by reason of s. 44 of the Finance Act, 1940, estate duty was payable under s. 2, sub-s. 1 (c), of the Finance Act, 1894, on the securities transferred in 1934. They contended that, through the removal of the words "voluntary" and "voluntarily" and a reference to the "volunteer" by s. 2, sub-s. 1 (c) from s. 38 of the Customs and Inland Revenue Act, 1881, as amended by the Customs and Inland Revenue Act, 1889, transactions for value, even though sales for full monetary consideration, were now within the operation of s. 38 as re-enacted in s. 2, sub-s. 1 (c); and that the retention of the words "gift," "donor," and "donee" in s. 38 did not preclude that construction, as the word "gift" had more than one meaning, and could merely denote a transfer. On a summons taken out to determine the validity of the commissioners' claim :

Held, that the contention of the commissioners was not well founded: had it been the intention of the legislature to make such a striking change in provisions relating to gifts and voluntary transactions, it would have been simple to substitute the word "assurance" for "gift" and the words "grantor" and "grantee" or "transferor" and "transferee" for the words "donor" and "donee."

Reasoning of Palles, C.B. in *Attorney-General v. Smyth* [1905] 2 I. R. 553 not followed. *Lord Advocate v. Heywood-Lonsdale's Trustees* (1906) 8 F. 724 and *Attorney-General for Ontario v. Perry* [1934] A. C. 477 considered.

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ADJOURNED SUMMONS.

The summons was taken out to have determined the validity of a claim by the Inland Revenue Commissioners for estate duty on the death of the seventh Earl Fitzwilliam on February 15, 1943, in respect of funds now valued at over 548,000*l.* The claim was made under s. 2, sub-s. 1 (c) of the Finance Act, 1894 (1) (incorporating s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs

(1) The Finance Act, 1894, s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (c) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom"

The Customs and Inland Revenue Act, 1881, s. 38: "(2.) The personal or movable property to be included in an account shall be property of the following descriptions, viz: (a) Any property taken as a donatio mortis causa made by any person dying on or after the first day of June, 1881,

"or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made three months before the death of the deceased. (b) Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person. (c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such

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and Inland Revenue Act, 1889) having regard to s. 44 of the Finance Act, 1940 (1).

The facts were stated by Danckwerts J., substantially in the following terms:—The transaction alleged to have given rise to the claim arose in the following manner:—In 1933 Earl Fitzwilliam, who was then about sixty-two years of age, wished to supplement his income by the purchase of an annuity. It was suggested that he might purchase from the trustees of a settlement dated April 19, 1933, made on the occasion of the marriage of his son, Lord Milton, and known as "the "special settlement," an annuity of 50,000*l.* a year for the sum of 375,000*l.*, that is to say, seven and a half years' purchase, which was the rate recommended as being appropriate by two actuaries.

The seventh earl had no beneficial interest under the special settlement, which settled certain capital moneys and investments on discretionary and other trusts, under which the whole income could be accumulated for twenty-one years (if the seventh earl or Lord Milton should so long live) for the ultimate benefit of a class of beneficiaries consisting of the persons, other than the seventh earl, capable of succeeding to the property, subject to a resettlement of the Fitzwilliam

"property for life or any other
"period determinable by reference
"to death is reserved either
"expressly or by implication to
"the settlor, or whereby the
"settlor may have reserved to
"himself the right, by the exercise
"of any power, to restore to
"himself, or to reclaim the abso-
"lute interest in such property."

The period of 3 months in para. (a) was extended successively to 12 months, 3 years and 5 years.

The Customs and Inland Revenue Act, 1889, s. 11:
"(1.) Sub-section 2 of s. 38 of the
"Customs and Inland Revenue
"Act, 1881, is hereby amended, as
"follows: The description of
"property marked (a) shall be
"read as if the word 'twelve'
"were substituted for the word
"three' therein, and the said
"description shall include pro-
"perty taken under any gift,

"whenever made, of which
"property bona fide possession
"and enjoyment shall not have
"been assumed by the donee
"immediately upon the gift and
"thenceforward retained, to the
"entire exclusion of the donor,
"or of any benefit to him by
"contract or otherwise."

(1) The Finance Act, 1940,
s. 44: "Where a person dying
"after the commencement of this
"Act has made a disposition of
"property in favour of a relative
"of his, the creation or disposition
"in favour of the deceased of an
"annuity . . . limited to cease
"on the death of the deceased
" . . . shall not be treated for
"the purposes of section three or
"of subsection (1) of section
"seven of the Finance Act, 1894.
"as consideration for the dis-
"position made by the deceased."

estate of the same date, namely April 19, 1933. The seventh earl's son, Lord Milton, was within this class of beneficiaries.

In pursuance of this suggestion on January 30, 1934, the trustees of the special settlement made a formal offer to sell to Earl Fitzwilliam an annuity of 50,000*l.* a year for his life for the sum of 375,000*l.*, which was to be satisfied by the transfer to the trustees of the following property to which Earl Fitzwilliam was absolutely entitled: 121,534*l.* 5 per cent debentures of Earl Fitzwilliam's Collieries Company; 88,998*l.* 16 per cent preference shares of 1*l.* each in the same company; 61,418*l.* 5 per cent. preference shares of 1*l.* each in Earl Fitzwilliam's Wentworth Estates Company, and eleven policies of assurance on the seventh earl's life which were valued by an actuary at the sum of 103,050*l.* The debentures and shares were to be taken at par value.

This offer was accepted by the seventh earl, and the debentures, shares and policies were duly transferred to the trustees and acknowledged by them in writing on February 14, 1934. It was not suggested that this transaction was other than a bona fide sale for full value in money or money's worth.

The trustees duly paid the annuity to the seventh earl down to the date of his death. The trustees also paid the premiums on the policies transferred to them after the date of the transfer down to the date of Earl Fitzwilliam's death or the maturity of the policies as the case might be. Moneys received on policies that had matured and from a sale of some of the debentures transferred to the trustees were represented at the date of the seventh earl's death by advances to the eighth earl on mortgage amounting to a total of 86,534*l.*

On the death of the seventh earl on February 15, 1943, estate duty was claimed in respect of the moneys and investments then representing the property which had been transferred to the trustees by the seventh earl in 1934. The transaction was a sale for full value, and, having regard to s. 3 of the Finance Act, 1894, duty would not have been claimed but for the provisions of s. 44 of the Finance Act, 1940.

The disposition in the present case was in favour of the trustees of the special settlement; but Lord Milton was one of the beneficiaries under the settlement, and it was admitted that in substance it was a disposition in favour of a relative of the seventh earl. It was, however, contended that the transaction did not fall within s. 2, sub-s. 1 (c) of the Finance Act, 1894, and that neither s. 3 of that Act nor s. 44 of the Act of 1940 was material.

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Upjohn K.C. and *N. C. Armitage* for the plaintiff trustees. This was a bona fide transaction for full consideration in which there was never any question of bounty. The commissioners contend that s. 44 of the Finance Act, 1940, takes the transfer of the securities in 1934 out of the class of transactions which were exempt from estate duty under s. 3 of the Finance Act, 1894. [Green's Death Duties (2nd ed.), p. 772; Austen-Cartmell on the Finance Acts (5th ed.), p. 22, referred to.] If it were not that certain authorities have suggested that words were to be read differently from their ordinary meaning, there would be no doubt as to the meaning s. 2, sub-s. 1 (c). It is contended by the commissioners that this transaction is a "gift" within the meaning of the sub-section. In fact, it was nothing of the kind: it was purely a commercial transaction in which there was no element of bounty. The word gift must be given its proper meaning. [*Attorney-General for Ontario v. Perry* (1) referred to.]

This claim is based on the reasoning of Palles C.B. in *Attorney-General v. Smyth* (2). That decision is not binding on this court, and the remarks of Palles C.B. are in fact obiter. All the authorities on this question, except *Attorney-General v. Johnson* (3), relate to gifts made in consideration of marriage. Those cases have become academic since the Finance (1909-10) Act, 1910, exempted gifts made in consideration of marriage, and the decisions are obiter on this point: see *Attorney-General v. Holden* (4); *Attorney-General v. Worrall* (5); Finance Act (1909-10) 1910, s. 59, sub-s. 2; Green's Death Duties, p. 321. This transaction never fell within s. 2, sub-s. 1 (c) at all. There was some element of bounty in all the previous cases, which is not to be found here. *Attorney-General for Ontario v. Perry* (1) is not really relevant. That decision related to a Canadian statute, and it was held that *Attorney-General v. Smyth* (2) did not apply. In *Attorney-General v. Holden* (4) the transactions in question were gifts in consideration of marriage by the respective fathers of the bride and bridegroom, and at that date, before the Finance (1909-10) Act, 1910 was passed, the removal of the word "voluntary" brought them within the scope of s. 2, sub-s. 1 (c).

It is impossible with a taxing statute to say that, through the striking out of the word "voluntary," simple English words

(1) [1934] A. C. 477, 479, 488.

(4) *Ibid.* 832.

(2) [1905] 2 I. R. 553.

(5) [1895] 1 Q. B. 99.

(3) [1903] 1 K. B. 617.

can be construed otherwise than according to their plain meaning. When a taxing statute is being construed the court must look fairly at the language used, and nothing must be read in or implied: *Canadian Eagle Oil Company, Ltd. v. The King* (1). The Crown has never sought to impose death duties on transactions where *no* element of bounty is involved. The gloss put on these sections is quite unnecessary for the decision of this case.

Armitage following. It is inconceivable that if Parliament had intended in 1889 to impose estate duty by s. 2, sub-s. 1 (c) not only on what the deceased had given in his lifetime but also on what he sold, and then by s. 3 to exempt property that had been sold from the duty so imposed, it would have used the language that appears in those sections.

Sir Frank Soskice, (S.-G.) and J. H. Stamp for the commissioners. Estate duty is leviable under s. 2, sub-s. 1 (c), of the Finance Act, 1894, on this disposition made by the deceased in 1934. Although it was a sale at market price, it was a disposition of property in favour of a relative of the deceased, and his right to receive the annual sum of 50,000*l.* for his life is not to be regarded as consideration for that disposition so as to bring it within the exemption of s. 3 of the Finance Act, 1894: see s. 44 of the Finance Act, 1940. The exemptions in s. 3 apply not only to property passing on the death under s. 1 but also to property deemed to pass on the death under s. 2. Section 44 of the Act of 1940 brings this transaction back within the scope of the legislation under which estate duty is payable.

The omission of the word "voluntary" from s. 2, sub-s. 1 (c) has the effect that a transaction may come within it whether it was voluntary or for value. Reliance is placed on *Attorney-General v. Smyth* (2) for this proposition. The retention of the word "gift" in s. 38 of the Customs and Inland Revenue Act, 1881, as re-enacted in s. 2, sub-s. 1 (c) of the Act of 1894, does not prevent this operation. The word "gift" has more than one meaning: besides meaning a disposition of property involving an element of bounty, it is also used to denote merely the transfer of property from one person to another. It is used at common law to denote a grant of an estate: *Sheppard's Touchstone* (7th ed.), vol. 1, p. 227 (ch. xi).

The commissioners must show that the reasoning of

(1) [1946] A. C. 119, 140.

(2) [1905] 2 I. R. 553, 569, 570, 571.

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Palles C.B. (1) as to the effect of the removal of the word "voluntary" can be supported. That decision still stands, and has received express approval: see *Lord Advocate v. Heywood-Lonsdale's Trustees* (2); *Attorney-General for Ontario v. Perry* (3). In the latter case Palles C.B. was called the "leading authority on the subject."

The ambit of the Finance Act, 1894, is extremely wide. It was a new type of Act, and it was intended to bring all property within the scope of death duties wherever situated. Section 1 is the general comprehensive section, relating to all property passing on the death. Section 2 sweeps up certain property which is "deemed" to pass on death. Section 3 prescribes certain exemptions from ss. 1 and 2. The mere fact that a later statute was passed on a misconception of an earlier statute does not affect the interpretation of the earlier statute, and if there is an ambiguity a later statute can be looked at: *Ormond Investment Co. Ltd. v. Betts* (4). An examination of the statutes passed since 1894 shows that Parliament intended that the removal of the word "voluntary" by s. 2, sub-s. 1 (c) should have the effect for which Palles C.B. contended: see s. 44 of the Finance Act, 1940, s. 31, sub-s. 2, of the Finance Act, 1939, and s. 38 of the Finance Act, 1944. Moreover, where a judicial interpretation of a statute has been incorporated in a later statute, it is no longer arguable that the interpretation of the earlier statute was otherwise than as so declared: *Attorney-General v. Clarkson* (5); *Attorney-General v. Fairley* (6). This case is in principle within *Attorney-General v. Clarkson* (5). It is the obvious case which is caught by s. 44 of the Act of 1940.

Upjohn K.C. in reply. An element of bounty existed in *Attorney-General v. Johnson* (7) and *Attorney-General v. Holden* (8). This need not mean the actual handing over of a sum of money. *Attorney-General v. Smyth* (9) is distinguishable as it relates to a transaction in consideration of marriage. Alternatively, the judgment of Palles C.B. is wrong and should not be followed. His reasoning that the omission of the word "voluntary" turns the word "gift" into a mere disposition is not justified. He attributes a

(1) [1905] 2 I. R. 553, 569,
570, 571.

(2) (1906) 8 F. 724.

(3) [1934] A. C. 477.

(4) [1928] A. C. 143.

(5) [1900] 1 Q. B. 156.

(6) [1897] 1 Q. B. 698.

(7) [1903] 1 K. B. 617.

(8) *Ibid.* 832.

(9) [1905] 2 I. R. 553.

meaning to words which they do not possess. [*Lord Advocate v. Heywood-Lonsdale's Trustees* (1) referred to.]

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Dec. 21. DANCKWERTS J. read the following judgment, in which he stated the facts substantially as above recited, and continued:—Duty is claimed in the present case under s. 2, sub-s. 1 (c), of the Finance Act, 1894. The words “voluntarily” or “voluntary” do not appear in the provision, but the words “gift” and “donee” and “donor” appear in it; and, as it was originally enacted, there seems to be no reason to attribute to this statutory provision any intention to include transactions for value. But the contention of the Commissioners of Inland Revenue is that by reason of the removal of the words “voluntary” “voluntarily” and “volunteer” by s. 2, sub-s. 1 (c) of the Finance Act, 1894, from the former provisions of the Customs and Inland Revenue Acts, 1881 and 1889, transactions for value, even though sales for full monetary consideration, are now included in those provisions as re-enacted by the Finance Act, 1894.

If it was the intention of the legislature to make such a striking change as to include sales for full monetary value in the former provisions relating to gifts, it certainly seems that an odd method of carrying out such a change was adopted. So long as the provisions were dealing with gifts and purely voluntary transactions, the words “gift,” “donor” and “donee” were the natural words to use and were entirely logical. It seems to me that it would have been perfectly simple (if it had been desired to include sales) to have substituted the word “assurance” for “gift” and “grantor” and “grantee” or “transferor” and “transferee” for the words “donor” and “donee.”

It is contended, however, on behalf of the commissioners that such changes were unnecessary because the words “gift” and “donor” and “donee” are words of more than one meaning and often have reference simply to transfers; and I was referred to Sheppard's Touchstone (7th ed.) vol. 1, p. 227 (ch. xi). It is said that the materiality of the words “purporting to operate as an immediate gift inter vivos” in s. 38, sub-s. 2 (a) of the Customs and Inland Revenue Act, 1881, is simply to show that the reference is to a transaction

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operating at once; and it is urged that this meaning must be the correct one, as otherwise transactions which pretended to be something other than a gift would not be caught by what is the evident intention of the section.

The case has been very fully and carefully argued, and I am very much indebted to counsel for their research and assistance. There does not appear to be any decided case directly holding that a sale for full value in money is within the provisions in question; but I was referred to a number of cases which were said to have a bearing upon the point, and to a number of other provisions in the statutes relating to estate duty which were alleged to assist me in arriving at the true interpretation of these particular statutory provisions.

In *Attorney-General v. Johnson* (1) the deceased had paid a sum of 500*l.* to a charity in lieu of a legacy, on terms that the charity should pay to him 25*l.* a year for life and to his wife 25*l.* a year for her life after his death. It was held by the Court of Appeal that estate duty was payable on the whole sum of 500*l.* although the commercial value of the annuity of 25*l.* was 210*l.* It is plain that the transaction was treated not as a sale at all but as in substance a gift. For this reason the Court of Appeal rejected the contention that 210*l.* should be deducted from the value of the property as a partial consideration for the transaction. As Vaughan Williams L.J. said (2): “. . . it was intended not to be a matter of pure “business, but one of bounty”

In *Attorney-General v. Holden* (3) the respective fathers of the bride and bridegroom agreed to make settlements on their children on the occasion of those persons' marriage, and the sums so provided were held to be subject to estate duty. This was quite clearly a contract by the two fathers to make gifts, and gifts were, therefore, involved. I have no difficulty in seeing that when the word “voluntary” was removed from the statutory provisions these gifts were clearly within their ambit.

The next case is *Attorney-General v. Smyth* (4), in the King's Bench Division of Ireland, before Pallett C.B., Johnson and Gibson JJ. It is technically not binding on me, but I should naturally attribute the greatest importance to a decision of that court on a point which I have to consider

(1) [1903] 1 K. B. 617.

(3) *Ibid.* 832.

(2) *Ibid.* 617, 625.

(4) [1905] 2 I. R. 553.

and decide, particularly having regard to the great reputation of Palles C.B., who delivered the reasoned judgment in that case. I think that it is upon this case that the commissioners principally rely. The question for determination, as stated by Palles C.B., was whether estate duty was payable on the death of a settlor on property included in an ante-nuptial settlement made by him on the marriage of his son within twelve months before his death, which settlement did not reserve to him an estate for life, or for any period determinable by reference to his death, but for which there was no consideration in money or money's worth. The court held that estate duty was payable. Palles C.B. delivered a judgment in which he discussed at some length the effect of the changes made by the Finance Act, 1894, and supplied a number of the arguments which were used on behalf of the commissioners in the present case. The decision, of course, only deals directly with a case where a settlement is effected in consideration of marriage, and has no direct bearing upon a sale for full monetary consideration. But a wider field was covered by Palles C.B. in his judgment.

With all due respect to Palles C.B., his reasons for rejecting the arguments of the defendants as to the effect of the removal of the word "voluntary" do not seem to me convincing. It may well be that the result which he reached on the facts of the case was correct. But if the word "gift" in the re-enacted provision be still regarded as something different from "sale", it does not follow that after the exclusion of the word "voluntary" the provision has the same meaning as before the Act of 1894, so that the change is nugatory. It seems to me that the effect of the change might be to bring in dispositions made in consideration of marriage (as in *Attorney-General v. Holden* (1)) until such dispositions were removed from taxation under s. 2, sub-s. 1 (c) of the Finance Act, 1894, by s. 59, sub-s. 2 of the Finance (1909-1910) Act, 1910, which sub-section in fact refers to "gifts" which are made in consideration of marriage or are proved to be part of the normal expenditure of the deceased.

Secondly, it seems to me that the argument that regard must be had to the history of the statutory provisions may well operate in exactly the opposite way to that suggested by Palles C.B. If the history of the statute shows that the word "gift" had a clear and sensible meaning in the statute as originally passed, why assume that a violent change has been

(1) [1903] 1 K. B. 832.

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caused to that word by the omission of the word "voluntary" alone? It also seems to me that there is no real basis for the subtle and scientific analysis on which Palles C.B. bases much of his explanation of the provisions in question. These provisions seem to me to have no more scientific basis than a desire to prevent evasion by a tax-payer of the duties which would otherwise be leviable on property devolving upon his death by means of a few obvious devices. And, lastly, the theory propounded by Palles C.B. seems to me to be at variance with the view of the English Court of Appeal in *Attorney-General v. Johnson* (1).

However, the judgment of Palles C.B. has received approval, and indeed praise, from Lord Dunedin in *Lord Advocate v. Heywood-Lonsdale's Trustees* (2). It seems to me, however, that this approval may have been somewhat uncritical, as the court had, without assistance from *Attorney-General v. Smyth* (3), already reached the conclusion that the judgment of the Lord Ordinary should be affirmed. This was another case of a transaction which was not in any sense a commercial transaction for monetary value, but a transaction operating under a marriage contract, to which it seems obvious that different considerations would apply.

Finally, it is said that *Attorney-General v. Smyth* (3) received the approval of the Privy Council in a judgment delivered by Lord Blanesburgh in *Attorney-General for Ontario v. Perry* (4). In that case it was in fact held by the Privy Council that the reasoning of *Attorney-General v. Smyth* (3), did not apply to the statute of Ontario which was in question. This result must in itself diminish the force of the approval.

Furthermore, the approval given by Lord Blanesburgh to the judgment of Palles C.B. (though described by him as "the leading authority on the subject") must have been of a limited character, as Lord Blanesburgh thought that a contract by a husband to settle property on his wife in consideration of her marriage to him was not within the terms of s. 2, sub-s. 1 (c) of the Finance Act, 1894. Lord Blanesburgh's view is, it seems to me, more clearly indicated by the following passage (4): "Their Lordships cannot leave the "consideration of the Finance Acts without referring to a "series of decisions under what may be regarded as the third "limb of s. 38, sub-s. 2 (a)"—and here I have corrected the

(1) [1903] 1 K. B. 477.

(2) 8 F. 724.

(3) [1905] 2 I. R. 553.

(4) [1934] A. C. 477, 485, 486.

mistaken reference to sub-s. 1 (9.)—"of the Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889. A reference to that limb of the sub-section supra, shows that the gift therein being dealt with need not be preceded by a 'disposition,' but that the words following seem to contemplate that there may be within their meaning a gift, although accompanied by some benefit to the donor by contract. On that part of the section it has been held that a gift does not cease to be a gift although there is some consideration for it received by the donor: a gift, it has been said, may be something which is not 'a pure and simple gift.' *Attorney-General v. Worrall* (1) and *Attorney-General v. Johnson* (2), may be cited as typical; and see *Attorney-General v. Holden* (3)." That language is quite inconsistent with the proposition that the word "gift" is to be treated as equivalent to "assurance" or "transfer" so as to include transactions for full monetary consideration.

I now turn to the consideration of certain statutory provisions which, it was argued, show that sales for full monetary consideration must be within the terms of s. 2, sub-s. 1 (c), of the Finance Act, 1894. Section 3 of the same Act, which exempts from duty transactions "for full consideration in money or money's worth" (and which was amended by s. 44 of the Finance Act, 1940) is the first of these, and was relied upon by Palles C.B., it seems, to support his theory of the purposes of the Act. It seems to me, however, that s. 3 could have been intended, and on its face clearly was intended, to meet other cases than those that might fall within s. 2, sub-s. 1 (c). It is to be observed, moreover, that the words of the section are that estate duty shall not be payable in respect of property passing on the death of the deceased "by reason only of a bona fide purchase." The reason advanced on behalf of the commissioners for the insertion of these words did not seem to me to be clear. It is evident that the words must contemplate some additional factor, and the section cannot apply unless the case otherwise be within the charging provisions of the Act.

It was contended on behalf of the commissioners that, if the provisions of an earlier statute are doubtful, that is to say, the provisions are "fairly and equally open to diverse meanings," it is permissible to look at later statutes in order

(1) [1895] 1 Q. B. 99.

(3) *Ibid.* 832.

(2) [1903] 1 K. B. 617.

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to ascertain the meaning of the earlier statute, and especially so if the later statute declares the meaning of the earlier. As authority for this proposition, I was referred to *Ormond Investment Co. Ltd. v. Betts* (1). It was argued that certain statutory provisions subsequent to the Finance Act, 1894, and in one instance subsequent to the date of the seventh Earl Fitzwilliam's death, indicate that s. 2, sub-s. 1 (c) of the Finance Act, 1894 must have the meaning attributed to it by the commissioners, that is to say, that transactions for full monetary consideration are subject to estate duty. These statutory provisions are s. 44 of the Finance Act, 1940 (to which reference has already been made), s. 31, sub-s. 2 of the Finance Act, 1939, and s. 38 of the Finance Act, 1944.

Of course none of these sections expressly concerns the interpretation of s. 2, sub-s. 1 (c) of the Finance Act, 1894, or the Customs and Inland Revenue Acts, 1881 and 1889. But it is argued that the inevitable deduction from their provisions is that the earlier provisions include sales for full value. Such a deduction does not seem to me to be by any means inevitable, and the sections appear to be equally capable of reference to other matters.

Furthermore, it is said (and I think that this is really a development of the same point) that, where the provisions of an earlier statute have been interpreted by the courts, and then that interpretation has been incorporated in a later statute, it is no longer open to argument that the true interpretation of the earlier Act is otherwise. The authority for this proposition is *Attorney-General v. Clarkson* (2). This concerned a situation which was caused by the decision in *Attorney-General v. Fairley* (3), in which it was held that estate duty was payable on property contingently settled, though the contingency might not in fact arise. As this was thought to be unfair, it was provided by s. 14 of the Finance Act, 1898, that, if it were shown that the contingency had not arisen and could never arise, the duty which had been levied should be repaid. Then in *Attorney-General v. Clarkson* (2) a similar question to that decided in *Attorney-General v. Fairley* (3) arose, and, though the court felt doubt as to the true construction of the earlier statutory provision, the construction adopted in *Attorney-General v. Fairley* (3) was followed in view of the statutory recognition given by s. 14 of the Finance

(1) [1928] A. C. 143, 154, 155,
156, 164, 165, 166.

(2) [1900] 1 Q. B. 156.

(3) [1897] 1 Q. B. 698.

Act, 1898. This rule is referred to in *Ormond Investment Co. v. Betts* (1).

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It is to be observed that this rule was applied when the legislature was indisputably referring to the construction put upon the earlier statutory provision and precisely providing for the situation which had thus arisen. In the present case the contention appears to be that the sections of the later Acts to which I have referred must be taken to have adopted not merely the decision of the Irish King's Bench Division in *Attorney-General v. Smyth* (2) but also the reasoning of Palles C.B. in his long judgment in that case. It seems to me that it is quite impossible to make any such deduction from the complicated and, in some respects, obscure sections in question.

Stress was laid on the wide ambit of the Finance Act, 1894, which sought to bring into the area of taxation on death all property real and personal, wherever situate, so that property must be said to be subject to duty unless an exemption can be found in the Act. That may be true in respect to property passing within the meaning of s. 1 of the Finance Act, 1894. It cannot be true in regard to s. 2 of the Act. By the latter section a number of cases are brought artificially within the ambit of the Act so that property is deemed to pass. For the purposes of cases falling, or claimed to fall, within s. 2, therefore, it seems to me that a charge for duty must not be assumed *prima facie* to exist, but must be found to be created by the terms of the Act.

Finally, it must not be forgotten that the provisions I have to construe are contained in a taxing statute. The rules to be applied to such a statute are well known, but it is worth while to refer to the statement in *Canadian Eagle Oil Co., Ltd. v. The King* (3): "In the words of the late Rowlatt J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, 'in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' (*Cape Brandy Syndicate v. Inland Revenue Commissioners* (4).)"

In the present case the one thing which is clear is that the

(1) [1928] A. C. 143, 155, 156.

(3) [1946] A. C. 119, 140.

(2) [1905] 2 I. R. 553.

(4) [1921] 1 K. B. 64, 71.

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statutory provisions which are said to impose liability are obscure. I am asked to give a construction to these provisions which is beyond anything decided by any of the courts that have had to consider the provisions in question, by reason of judicial statements which were purely obiter and were in no way, as it seems to me, necessary to the decisions in question. The application of these statements in the manner now contended for would carry the burden of taxation imposed in 1894 far beyond the subject-matter of the cases in which they occur.

After all, the Finance Act, 1894, was an Act inaugurating a new scheme of taxation, and the complications of the sections added from time to time to deal with methods of evasion of duty which were discovered as the burden of death duties was made heavier were probably never anticipated at the date when that Act was passed. I do not think that it would be right for me to attribute to the draftsman of the Finance Act, 1894, an intention to impose upon the Customs and Inland Revenue Acts, 1881 and 1889, the far-reaching change for which the commissioners now contend, and I certainly cannot find in those statutory provisions words clearly imposing tax in the circumstances of the present case.

Declaration accordingly.

Solicitors : Warren, Murton & Co., for Newman and Bond, Barnsley ; Solicitor of Inland Revenue.

I. G. R. M.

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WALKER AND ANOTHER *v.* LAWSON AND OTHERS.

[1949 B. 5611.]

Will—Legacies free of duty—Devise and bequest of property in trust after payment of funeral and testamentary expenses and debts for four persons nominatim—Testatrix predeceased by one of them—Lapse of one fourth—Incidence of debts and funeral and testamentary expenses and legacies and legacy duty—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 33, sub-ss. 1, 2 ; s. 34, sub-s. 3 ; sch. I, pt. II.

A testatrix by her will made in 1947 bequeathed free of duty specific articles and pecuniary legacies, and proceeded: "I give devise and bequeath all my real estate and all my personal estate not hereby otherwise disposed of (including all property over which I shall have power to appoint) unto my trustees upon trust that my trustees shall sell call in and convert into money the same or such part thereof so far as shall be necessary [sic] and after payment of all my funeral and testamentary expenses and debts shall stand possessed of the residue thereof in trust to pay and transfer the same equally between the said M., I., B. and J. absolutely." In 1948 the testatrix died, leaving her husband, but no issue, her surviving, and predeceased by B. named in the will. In 1949 I. died and very shortly before the hearing of this summons J. died in a road accident.

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On a summons by the trustees of the will to have determined, among other things, whether, on the true construction of the will and by virtue of s. 34, sub-s. 3 of, and pt. II of sch. I to, the Administration of Estates Act, 1925, B.'s lapsed one-fourth share in the residuary estate was applicable, in exoneration of the other shares in it, towards any and if so which of the following liabilities: the funeral, testamentary and administration expenses, debts and liabilities payable thereout; the pecuniary legacies bequeathed by the will and the legacy duty on those bequeathed free of duty; and the legacy duty on the specific legacies bequeathed free of duty.

Held, that, in effect, no provision at all was made by s. 34, sub-s. 3, with regard to such things as legacies, so that the law in force before 1926 applied to the legacies in question, and the pecuniary and specific legacies and the duty on them were all payable out of the whole estate before the division of the residuary estate into four equal parts and the giving of it to four named persons, the lapsed share thus being simply a lapsed share of the estate after those burdens had been cleared.

In re Thompson [1936] Ch. 676 and *In re Boards* [1895] 1 Ch. 499 considered and applied.

ADJOURNED SUMMONS.

By her will dated April 3, 1947, a testatrix, Bertha Ann Burrowes Beaumont, made specific bequests free of duty, bequeathed certain pecuniary legacies free of duty, and proceeded: "I give devise and bequeath all my real estate and all my personal estate not hereby otherwise disposed of (including all property over which I shall have power to appoint) unto my trustees upon trust that my trustees shall sell call in and convert into money the same or such part thereof so far as shall be necessary [sic] and after payment of all my funeral and testamentary expenses and debts shall stand possessed of the residue thereof in trust to pay and

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" transfer the same between the said Minnie Lawson Isabel
" Lawson Bertha Lawson and Joanna Millin absolutely."

On August 26, 1948, the testatrix died, leaving her husband, Frank Herbert Beaumont, but no issue, her surviving and predeceased by Bertha Lawson named in the will. On January 7, 1949, Mary Isabella (in the will called " Isabel ") Lawson died. Joanna Millin died as the result of a road accident very shortly before the hearing of this summons, on which questions were raised concerning the incidence of debts and funeral and testamentary expenses, of the legacies given by the will, and of the duty payable on those legacies under s. 34, sub-s. 3 of the Administration of Estates Act, 1925, and part II of sch. I to the Act (1).

On November 4, 1949, this summons was taken out by the trustees of the will. The defendants to it were Minnie Lawson (who was also the personal representative of Bertha Lawson), Joanna Millin, who, as stated above, died before the hearing, and the husband of the testatrix, Frank Herbert Beaumont,

(1) Administration of Estates Act, 1925, s. 33, sub-s. 1: " On
" the death of a person intestate
" as to any real or personal
" estate, such estate shall be held
" by his personal representatives
" —(a) as to the real estate upon
" trust to sell the same; and
" (b) as to the personal estate upon
" trust to sell call in and convert
" into money such part thereof as
" may not consist of money . . . "

Sub-section 2: " Out of the net
" money to arise from the sale
" and conversion of such real and
" personal estate (after payment
" of costs), and out of the ready
" money of the deceased (so far
" as not disposed of by his will,
" if any), the personal representa-
" tive shall pay all such funeral,
" testamentary and administra-
" tion expenses, debts and other
" liabilities as are properly payable
" thereout having regard to the
" rules of administration con-
" tained in this Part of this Act,
" and out of the residue of the
" said money the personal repre-
" sentative shall set aside a fund

" sufficient to provide for any
" pecuniary legacies bequeathed
" by the will (if any) of the
" deceased."

Section 34, sub-s. 3: " Where
" the estate of a deceased person
" is solvent his real and personal
" estate shall, subject to rules
" of court and the provisions
" hereinafter contained as to
" charges on property of the
" deceased, and to the provisions,
" if any, contained in his will, be
" applicable towards the discharge
" of the funeral, testamentary
" and administration expenses,
" debts and liabilities payable
" thereout in the order men-
" tioned in Part II of the First
" Schedule to this Act."

Part II of sch. I: " Order of
" application of assets where the
" estate is solvent. 1. Property of
" the deceased undisposed of by
" will, subject to the retention
" thereout of a fund sufficient to
" meet any pecuniary legacies
" . . . 5. The fund, if any,
" retained to meet pecuniary
" legacies."

who was interested in any property of the testatrix undisposed of by her will.

The question for decision was whether the various burdens were to be borne wholly by the one-fourth share given to Bertha Lawson which had lapsed, or were to be paid out of the whole of the residuary estate before any question of division arose, so that each person took a share of the whole, diminished accordingly, and the only lapse was of such a diminished share. The summons asked, among other things, whether, on the true construction of the will and by virtue of s. 34, sub-s. 3, and part II of sch. I to the Administration of Estates Act, 1925, the share bequeathed to Bertha Lawson was applicable towards the discharge of any and if so which of the undermentioned liabilities of the residuary estate in exoneration of the other shares of residue, namely : (a) the funeral, testamentary and administration expenses, debts and liabilities payable thereout ; (b) the pecuniary legacies bequeathed by the will and the legacy duty on those bequeathed free of duty ; (c) the legacy duty on the specific legacies bequeathed free of duty.

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J. A. Armstrong for the plaintiffs, the trustees of the will.

W. A. Bagnall for the defendant, Minnie Lawson. Admittedly, "debts and funeral and testamentary expenses" come out of general residue before division. The legacies, however (including legacy duty on the pecuniary and specific legacies), should come out of the lapsed share : Administration of Estates Act, 1925, s. 34, sub-s. 3, and sch. I, part II. A mere gift of legacies followed by a gift of residue does not affect the statutory order. In a case such as the present legacies come out of residue generally before division only if there is a gift of residue "subject to" or "after payment of" legacies : *In re Tong* (1). The statutory order is not displaced in the present case : *In re Worthington* (2).

E. M. Winterbotham for the husband of the testatrix. In s. 34, sub-s. 3 of the Act there is nothing whatever about legacies. Further, part II of sch. I makes no express and, it is submitted, no implied provision as to the parts of the estate out of which legacies are to be paid. The only part of the Act which does make such provision is s. 33, sub-s. 2, and this depends on the statutory trust for sale in s. 33, sub-s. 1, which is displaced by the trust for sale in the will :

(1) [1931] 1 Ch. 202.

(2) [1933] Ch. 771.

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In re McKee (1). There is, therefore, in the Act no provision applicable to the present case directing how legacies are to be borne, and, accordingly, the law in force before 1926 must apply. The legacies will therefore be paid out of the entirety of the personal estate: *In re Thompson* (2), applying *In re Boards* (3). Under the law in force before 1926 the legacies are payable out of the whole of the personal estate before the ascertainment of the amount which is to be divided into four equal shares, not out of Bertha Lawson's lapsed one-fourth in exoneration of all or any of the others. All four shares must bear the legacies and the duties: and Bertha's share will be ascertainable, as will the other three, only after they have been paid, whereupon the testatrix's husband will be entitled to whatever is left of Bertha's share.

DANCKWERTS J. As Mr. Winterbotham contended, s. 34, sub-s. 3 of the Administration of Estates Act, 1925, has in effect made no provision with regard to such things as legacies. On the authorities, the funeral, testamentary and administration expenses, debts and liabilities undoubtedly come out of the whole residuary estate before division, because that is what the will says; but the position of the legacies depends on the old law. By that law, that is, before the Administration of Estates Act, 1925, legacies would plainly come out of the residuary estate, and, although in this particular will there is not in terms a gift of residue, there is a gift of "all my real estate and all my personal estate not hereby otherwise disposed of"; and it seems to me that the old law applies unless something in the Administration of Estates Act, 1925, demonstrably eliminates or modifies the old law as to the extent of such burdens.

On this point I am assisted by *In re Thompson* (2) in which Clauson J., held that the old law, laid down in *In re Boards* (3), still remained operative after the Administration of Estates Act, 1925, came into force, so as to cast the primary burden of legacies on the personal estate.

It seems to me, therefore, that in the present case the pecuniary legacies and the specific legacies, and the duty on those legacies which is in the form, or has the effect, of an additional legacy, are all payable out of the whole estate before coming to what is divided into four equal parts and given to

(1) [1931] 2 Ch. 145.

(2) [1936] Ch. 676.

(3) [1895] 1 Ch. 499.

four named persons, so that the lapsed share is simply a lapsed share of the estate after those burdens have been cleared.

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Solicitors: *Peacock & Goddard, for Johnstone, Williams & Walker, Nottingham; Collyer-Bristow & Co., for Wilkins & Thompson, Uttoxeter; Sharpe, Pritchard & Co., for Rendall, Litchfield & Co., Bournemouth.*

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In re DUKE OF NORFOLK

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PUBLIC TRUSTEE *v.* INLAND REVENUE
COMMISSIONERS

1950
Feb. 10, 13;
Mar. 6.

[1949 N. 73]

Evershed M.R.,
Somervell and
Jenkins L.JJ.

Revenue—Estate duty—Will—Annuity payable to A and after his death to B—Property passing on death—Duty how payable—Finance Act, 1894 (57 & 58 Vict. c. 30) ss. 1, 2, sub-s. 1 (b), 7 sub-s. 7.

Where one continuing annuity for two or more lives is given to two or more persons in succession and charged on property on the death of any annuitant other than the last to die, estate duty is payable under s. 1 of the Finance Act, 1894, on the footing that it is the annuity which passes on the annuitant's death. The duty is calculated on the principal value of the annuity assessed actuarially for the residue of the period for which it is payable. The Crown is not entitled to claim duty as on the cesser of an interest under s. 2, sub-s. 1 (b), of the Act of 1894 on a slice of the capital of the property charged corresponding to the proportion of its income theretofore absorbed by the annuity ascertained in the manner provided by s. 7, sub-s. 7. On the death of an annuitant, other than the last to die, no benefit accrues or arises by the cesser of his interest within s. 2, sub-s. 1 (b).

An annuity charged on property is not, nor is it equivalent to, an interest in a proportion of the capital of the property charged sufficient to produce its yearly amount on the death of an annuitant. The Crown is not entitled to charge duty under s. 1 on a slice of capital ascertained by means of calculations on the lines prescribed by s. 7, sub-s. 7.

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Principle stated by Lord Macnaghten in *Cowley (Earl) v. Inland Revenue Commissioners* [1899] A. C. 198 that where an event supports a claim to estate duty under s. 1 of the Finance Act, 1894, it cannot also support an alternative claim under s. 2, applied. *In re Cassel* [1927] 2 Ch. 275 approved. *In re Northcliffe* [1929] 1 Ch. 327 and *Christie v. Lord Advocate* [1936] A. C. 569 considered.

APPEAL from Wynn-Parry J. (1).

By cll. 3 and 5 of his will dated February 15, 1904, Henry, Duke of Norfolk (hereinafter called "the testator"), devised and appointed his freehold hereditaments to his trustees for the term of 1,000 years and declared trusts thereof (inter alia) out of the rents and profits to pay any annuity bequeathed by him. By cl. 24 he declared that any annuity should be deemed to be bequeathed clear of all death duties payable in respect thereof and that such duties should be paid out of his residuary personal estate.

By cl. 3 of the first codicil, dated November 19, 1908, to his will the testator gave to his trustees an annuity of 3,000*l.* (subsequently reduced by a second codicil to 2,000*l.*) to commence from the day of his death and to continue payable during the joint lives of his brother Edmund Bernard, Viscount Fitzalan (hereinafter called "the late viscount") and his son, Henry Edmund Talbot (hereinafter called "the present viscount") and the life of the survivor of them and to be paid to the late viscount during his lifetime and after his death, to the present viscount.

The testator died on February 11, 1917, and the late viscount died on May 18, 1947. At the date of the issue of this summons the Public Trustee was the sole trustee of the will.

The estate-duty authorities claimed estate duty on the death of the late viscount under s. 2, sub-s. 1 (b) of the Finance Act, 1894, on the slice of capital required to produce the annuity, on the footing that as annuitant the late viscount had an interest on the capital charged with the annuity and that cesser of that interest gave rise to a benefit taxable under that sub-section. This claim admittedly departed from the previous practice of the estate-duty office, which in cases of this class was to claim only under s. 1 of the Act on the actuarial value of the annuity, as on a passing of the annuity itself, and the Public Trustee contended that this practice was alone permissible.

This summons was taken out by the Public Trustee to have determined whether estate duty became payable on the death of the late viscount : (a) under s. 1 of the Finance Act, 1894 (1) and only on the value of a continuing annuity of 2,000*l.* for the life of the present viscount ; or (b) under s. 2, sub-s. 1 (b) of that Act on the capital value of the proportion of the testator's estate required to produce an annuity of 2,000*l.* In the alternative, the summons asked to what extent and on what basis estate duty became payable on the death of the late viscount.

Wynn-Parry J. held that, on the death of the late viscount, estate duty became payable under s. 1 of the Finance Act, 1894, on the value of a continuing annuity for the life of the present viscount.

The Crown appealed. In an amended notice of appeal it contended that duty became payable on the death of the late viscount either under s. 1 of the Finance Act, 1894, in respect of the share producing the annuity of the property charged with it, being a share bearing the same ratio to the whole as the annuity bore to the whole income of such property ; or, secondly, under s. 2, sub-s. 1 (b) of the Act of 1894, in respect of the property charged with the payment to the extent to which a benefit accrued or arose by the cesser of the interest of the late viscount in the manner provided by s. 7, sub-s. 7, of the Act. The first ground of appeal was new and had not been argued before Wynn-Parry J.

(1) Finance Act, 1894, s. 1 :
 " In the case of every person
 " dying after the commencement
 " of this part of this Act, there
 " shall . . . be levied and paid,
 " upon the principal value . . .
 " of all property . . . which
 " passes on the death of such
 " person a duty, called ' Estate
 " duty ' ."

Section 2, sub-s. 1 : " Property
 " passing on the death of the
 " deceased shall be deemed to
 " include . . . (b) Property in
 " which the deceased or any other
 " person had an interest ceasing
 " on the death of the deceased,
 " to the extent to which a benefit

" accrues or arises by the cesser
 " of such interest. . . ."

Section 7, sub-s. 7 : " The
 " value of the benefit accruing
 " or arising from the cesser of an
 " interest ceasing on the death
 " of the deceased shall—(a) if
 " the interest extended to the
 " whole income of the property,
 " be the principal value of that
 " property ; and (b) if the interest
 " extended to less than the whole
 " income of the property, be the
 " principal value of an addition
 " to the property equal to the
 " income to which the interest
 " extended."

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Sir Andrew Clark K.C. and *J. H. Stamp* for the Crown. The question is how, when an annuity is given, continuing for the lives of two or more annuitants, estate duty is chargeable on the death of one of them leaving a survivor or survivors. The practice of the estate-duty office has been to claim duty under s. 1 of the Finance Act, 1894, as on a passing of the annuity itself, the duty being charged on the actuarial value of the annuity. The commissioners now desire to establish a claim on the slice of capital producing the annuity, either on the ground that such a slice of capital actually passes under s. 1 or on the ground that it is deemed to pass under s. 2, sub-s. 1 (b). The former ground is relied on for the first time in this court and was not mentioned in the court below. In the court below *Wynn-Parry J.* held that as there was an actual passing of the annuity under s. 1, any notional passing under s. 2 was precluded by *Cowley (Earl) v. Inland Revenue Commissioners* (1).

As to the first point it is submitted that what passed under s. 1 was the capital slice of the trust property required to produce the annuity. In the case of an annuity payable out of a specific property the annuitant has an interest in the capital of that property: *Attorney-General v. Watson* (2), *Skinner v. Attorney-General* (3); and to this interest the next annuitant succeeds on his death. If the annuitant were entitled on succession to an aliquot share of income, there could be no question but that a corresponding share of capital would pass on the first death (see *In re Northcliffe* (4) and *Christie v. Lord Advocate* (5)). In relation to a capital fund charged with an annuity, the position of an annuitant is no different from that of a tenant for life of a share of income. The present case is distinguishable on its facts from *In re Cassel* (6).

As regards the second ground it is contended that the late viscount had an interest in the settled property which ceased on his death and that estate duty is payable under s. 2, sub-s. 1 (b) on the benefit which accrues on his death. That benefit is the slice of the estate which was required to pay the annuity and which is discharged from the liability to pay the annuity on his death, the slice being valued in accordance with the provisions of s. 7, sub-s. 7.

(1) [1899] A. C. 198.

(2) [1917] 2 K. B. 427.

(3) [1940] A. C. 350.

(4) [1929] 1 Ch. 327.

(5) [1936] A. C. 569.

(6) [1927] 2 Ch. 275.

Finally it is not disputed that on the death of the present viscount estate duty will be chargeable on the capital slice. The position which has arisen on the death of the first viscount is no different in principle, and accordingly duty should be assessed on the same basis. The fact that duty can be claimed in respect of the passing of the annuity under s. 1 does not preclude a claim for duty under s. 2, sub-s. 1 (b). The property is different: in the one case the annuity, in the other the capital of the trust estate, is chargeable.

Upjohn K.C. and *H. A. Rose* for the plaintiff, the Public Trustee. This is a case of an annuity subsisting for two lives. The Crown, in order to obtain an option to charge under either of two sections, has twisted the ordinary legal conception of an annuity. An annuity is a chose in action. A life interest in a share of an estate is quite different from the interest of an annuitant whose annuity is charged on a trust estate. The nature of an annuitant's rights appear from *Bignold v. Giles* (1). On the death of the late viscount there was no passing of the trust estate under s. 1. What passed was the annuity. The trust estate continued charged with the same annuity. There is no authority for applying the slice theory based on s. 7, sub-s. 7 to property passing under s. 1. Section 7, sub-s. 7 only applies where property is deemed to pass under s. 2. This case is covered by the decision of Russell J. in *In re Cassel* (2). Maugham J. in *In re Northcliffe* (3) misapprehended the basis of Russell J.'s decision in *In re Cassel* (2).

Sir Andrew Clark K.C. in reply. What passed on the death of the late viscount was the slice of capital, valued in accordance with s. 7, sub-s. 7, necessary to produce this annuity. The annuity was charged on the whole trust estate, but the property which passed is limited to the share necessary to produce the annuity. That there are no decisions in support of the Crown's contention is due to the fact that the estate-duty office has in the past always conceded that estate duty was payable on the value of the annuity. *In re Cassel* (2) was wrongly decided, and the court is asked to say that duty is payable under s. 1 on the slice required to produce the annuity; alternatively, that duty is payable under s. 2, sub-s. 1 (b).

Cur. adv. vult.

(1) (1859) 4 Drew. 343.

(2) [1927] 2 Ch. 275.

(3) [1929] 1 Ch. 327.

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Mar. 6. The following judgments were read.

EVERSHED M.R. (read by SOMERVELL L.J.). In this appeal the Commissioners of Inland Revenue have taken two distinct points, the first having been added by our leave and by consent of the plaintiff, the respondent to the notice of appeal, and not having been taken before Wynn-Parry J. These two contentions are clearly stated by the terms of the notice of appeal, as amended, and are as follows: "That in the events "which have happened estate duty became payable upon the "death of the Right Honourable Edmund Bernard Viscount "Fitzalan of Derwent either (a) under s. 1 of the Finance Act, "1894, in respect of the share producing the said annuity of "the property charged therewith, being a share thereof bearing "the same ratio to the whole as the said annuity bears to the "whole income of the same property; or (b) under s. 2, "sub-s. 1 (b) of the Finance Act, 1894, in respect of the property "charged with the payment of the said annuity to the extent "by which a benefit accrued or arose by the cesser of the "interest of the said deceased therein, such benefit to be "valued in the manner prescribed by s. 7, sub-s. 7 of the said "Act."

If the Crown is entitled to succeed under either head of appeal, the result will be to effect a change in the practice hitherto adopted by the estate-duty office in levying estate duty in respect of a single annuity bequeathed to several persons in succession upon the deaths of the annuitants (other than of the last). That circumstance is not in itself a valid reason for rejecting the Crown's contention, though (having regard to the numerous occasions on which revenue statutes are reviewed by Parliament) it inclines me to regard the contention with caution. The second ground of appeal involves the existence (at least) of an option in the Crown as regards the basis on which estate duty may be charged in respect of one and the same subject of benefaction; and this also appears to me to require that the argument be cautiously received.

It was only the second ground which was considered—and rejected—by Wynn-Parry J., and, since we are all agreed that the view of the judge was correct, I propose to deal with it first.

According to this head of the Crown's argument there arose upon the death of the late viscount, who had enjoyed the first life interest in the annuity of 2,000*l.* a year

bequeathed by the will and codicils, two distinct subject-matters of taxation, namely (1.) the annuity itself; that is, the right to receive the sum of 2,000*l.* a year for the remainder of the life of the present viscount, and (2.) the benefit which accrued to the Norfolk estates by the cesser of the late viscount's right to enjoy the annuity. It is clear that the first subject falls to be taxed exclusively by reference to s. 1 of the Act of 1894, but that the second can only be taxed (if at all) by virtue of s. 2, sub-s. 1 (b) of the Act.

Wynn-Parry J. was of opinion that the simultaneous existence of a right to tax under s. 1 and s. 2 was inconsistent with the well-known statement of Lord Macnaghten in *Cowley (Earl) v. Inland Revenue Commissioners* (2), and could not, therefore, be sustained. I agree with him. It is true that the actual language used by Lord Macnaghten, and particularly his words: "Section 2 does not apply to an interest in property which passes on the death of the deceased," was used in reference to a case in which only one possible subject-matter of taxation was under consideration; and that it is of the essence of the Crown's argument in the present case that there are two distinct proprietary interests. Mr. Stamp observed further that the celebrated pronouncement of Lord Macnaghten, which has constituted one of the most significant decisions on the interpretation of the Finance Act, 1894, did not in fact represent the determination of an issue argued in the *Cowley* case (1). Nevertheless, I think with Wynn-Parry J. that Lord Macnaghten's opinion ought not to be regarded as subject to such refinement, and that the law (at any rate in the courts of first instance and in this court) must be taken to be that, as regards any such single benefaction as that with which we are concerned, the application of s. 2 of the Act is necessarily excluded by the application to the annuity itself of s. 1.

In conceding that the Crown had only an option under this part of his argument, Sir Andrew Clark stated that he was compelled so to do by the terms of s. 7, sub-s. 10, of the Act which reads as follows: "Property passing on any death shall not be aggregated more than once, nor shall estate duty in respect thereof be more than once levied on the same death." I am inclined to think that Sir Andrew Clark is thereby shown to be on the horns of a dilemma; for if he

(1) [1899] A. C. 198, 212.

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is right in saying that there are here in truth two distinct properties, two distinct subject-matters of taxation, then, *prima facie*, I should have thought s. 7, sub-s. 10 would be inapplicable; on the other hand, if there is but one property, one subject-matter of taxation (as the invocation of s. 7, sub-s. 10 seems to import) the argument necessarily fails in limine.

Wynn-Parry J. felt himself further bound by the decision of Russell J. in the second case of *In re Cassel* (1). Again I think that the judge was right. But since there has been in this court considerable argument upon the true effect of that decision and of the views taken of it in subsequent cases, including particularly the case of *Christie v. Lord Advocate* (2), and since the consideration of this matter is pertinent also to the first head of the Crown's argument before us, I will give my reasons for construing Russell J.'s decision in the way which Wynn-Parry J. adopted.

The subjectmatter in *In re Cassel* (1) which gave rise to the claim for duty was a direction in the testator's will that during a period of years ending in 1995 the trustees should provide the annual sums required for payment of rent, rates and certain other outgoings in respect of premises known as Brook House, which was itself bequeathed in trust for the benefit of several persons in succession. The first of these persons had died. Russell J. expressed his own view that, apart from authority, he would have supposed in the case of a gift to A. for life, followed by an absolute gift to the same subject matter to B., that no property "passed" within the meaning of s. 1 of the Finance Act, 1894, and that tax would have been levied as upon the cesser of an interest by virtue of s. 2, sub-s. 1 (b). But he regarded himself bound by the *Cowley* case (3) to hold that there was in truth a passing within s. 1. He further stated that, had he been at liberty to follow his own inclinations, he would, in accordance with s. 7, sub-s. 7 (b) of the Act, and by taking the average amount expended annually by the trustees in respect of rent and other outgoings at 5,000*l.*, have fixed the "slice" deemed to have passed at 78,250*l.* Since, however, *ex hypothesi*, this method of assessment was not open to him and there was a direct "passing" of property, namely, the right to receive or enjoy the benefit of the variable annual sums, he was faced with the

(1) [1927] 2 Ch. 275.

(3) [1899] A. C. 198.

(2) [1936] A. C. 569.

difficulty of determining, pursuant to s. 7, sub-s. 5 of the Act, the principal value "in the open market" of something which, from its nature, could have no market and was in other respects obviously most difficult of estimation.

The above is, in my judgment, a brief but essentially accurate statement of Russell J.'s decision so far as relevant to the present case, and it involves necessarily the determination that, for estate, duty purposes, an annual sum bequeathed to or for the benefit of several persons in succession is the property which passes on the deaths of those persons (save the last) and that the duty is exigible in respect of its capital value. Thus Russell J. said (1): "What then is the property which passes on Mrs. Cassel's death? In my opinion the true answer is the benefit of the annual sum payable under the special clause What passes is the right to enjoy the benefit of that annual sum. That is the property which passed on the death of Mrs. Cassel."

In my judgment, accordingly, Wynn-Parry J. rightly held that the present case, at least so far as he was concerned, was governed by *In re Cassel* (2). In this court we were invited to take a different view and to hold either that *In re Cassel* (2) was a decision depending solely upon its own peculiar facts and inapplicable in principle to a case of an ordinary continuing annuity, or that it was wrongly decided.

To the first ground of criticism colour is undoubtedly lent by certain observations, first, of Maugham J. in *In re Northcliffe* (3) and second of Lord Russell himself as a member of the House of Lords in *Christie v. Lord Advocate* (4). Both the two last-mentioned cases were instances of dispositions of aliquot shares of the general income of an estate to be enjoyed in succession, as distinct from an annuity or yearly sum, which, even though variable (as in the case of *In re Cassel* (2)) is in no way dependent upon or related to the general income of the estate; and they constitute authority for the proposition that on the death of the first taker of the aliquot share of income there is a "passing" within s. 1 of the Act of a like share of the corpus. But they are, in my judgment and for reasons which I will later give, no authority for the view that on the death of the first taker of a continuing annuity there is a passing of any part of the corpus of the property out of which the annuity is raised or on which it may be charged.

(1) [1927] 2 Ch. 275, 280, 281.

(2) *Ibid.*

(3) [1929] 1 Ch. 327.

(4) [1936] A. C. 569.

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In distinguishing from his own case of *In re Northcliffe* (1) that of *In re Cassel* (2) Maugham J. used of the latter these words (3): "It was therefore almost impossible to say that the "principal value of the property out of which that sum had to "be paid passed on the death of the first tenant for life. "Accordingly, quite naturally as I think, he" (that is Russell J.) "came to the conclusion that the case was of a very "special character, and, there being no section of the Act of "1894 which really exactly applied, it had to be met by "holding that what passed was the benefit of the annual sum "which was payable under the special clause." It is true that the relevant provision in *In re Cassel* (2) was of a "very "special," that is, unusual, character. But, with the greatest respect to Maugham J., in other respects he appears to me to have misapprehended Russell J.'s decision and the basis on which it rested. As I have already stated, Russell J.'s own opinion would have favoured, in the case before him as in the case of successive interests in an aliquot share of general income, a notional passing under s. 2 of the Act. Had he been free so to decide, he would have found no difficulty in arriving at the appropriate capital sum. He in fact did the calculation and arrived at the figure of 78,250*l.* But he held himself (rightly) bound to treat both types of case as falling under s. 1 of the Act. There was thus no question but that s. 1 did in fact and "exactly" apply to the annual sums in question, and the property to which it applied was "the "benefit of the annual sum payable under the special clause."

But Russell J. appears himself (as Lord Russell of Killowen) to have felt some misgiving in *Christie's* case (4): for in the course of his opinion in that case he said of his earlier judgment: "That was indeed a very special case, in which, it "having been decided that the *Cowley* case (5) compelled me "to treat it as falling within s. 1 of the Act, it became apparent "that no capital sum could be earmarked as producing either "actually or notionally an annual sum which necessarily "varied in amount within elastic limits. I indicated as best "I could the lines upon which a valuation might be fairly "reached." It must be confessed that the language which I have quoted seems to indicate that Lord Russell may then have thought that only the "very special" circumstances of the

(1) [1929] 1 Ch. 327.

(4) [1936] A. C. 569, 576.

(2) [1927] 2 Ch. 275.

(5) [1899] A. C. 198.

(3) [1929] 1 Ch. 327, 333.

Cassel case (1) prevented its determination on lines similar to those applicable to cases of aliquot shares of income, that is, by regarding the property which passed as the appropriate capital amount which "produced" the annual sums.

But Lord Russell was only concerned to show that *In re Cassel* (1) was no authority for a method of taxing an aliquot share of general income. The ordinary case of a continuing annuity was not present to his mind. Nor is it suggested in the present case that the method of assessment appropriate to a continuing annual sum, whether fixed or variable, determines the method of assessment for an aliquot share of income. The two things are, for estate-duty purposes, essentially different. But in my judgment the principle of *In re Cassel* (1) is the principle appropriate to a continuing annuity such as that in the present case, which is in essential characteristics the same as the annual sum in *In re Cassel* (1). The real difficulty in *In re Cassel* (1) (and the only difficulty) lay, not in deciding by reference to which section, s. 1 or 2, duty was exigible, but, having regard to the peculiar and "special" nature of the annual sums provided, in discovering the "principal value" of those sums by applying the method of estimation enjoined by the relevant s. 7, sub-s. 5, of the Act. Thus, finally, in *Inland Revenue Commissioners v. Crossman* (2) Lord Russell himself again observed: "I have recently explained in *Christie v. Lord Advocate* (3) how very special that case" (*In re Cassel* (1)) "was in its facts; and that all that I did was "to indicate, as best I could, the lines upon which a valuation "might fairly be reached of a benefit which (being purely "personal) could not be offered for sale at all."

I should add that Sir Andrew Clark further criticized Russell J.'s decision in *In re Cassel* (1) on the ground that, on the hypothesis that s. 2 applied, his taking for the purposes of his calculation the average figure of 5,000*l.* was in excess of the directions to be found in s. 7, sub-s. 7 (b). But I cannot take that criticism seriously. The provisions of that paragraph have only been rendered workable by giving a most liberal interpretation to its enigmatic language. I cannot think that such an objection would be found in the commissioners' mouths when, on the death of the last individual to enjoy the benefit of the special clause, s. 2, sub-s. 1 (b) and s. 7, sub-s. 7 (b) of the Act would in any case have to be applied.

(1) [1927] 2 Ch. 275.

(2) [1937] A. C. 26, 68.

(3) [1936] A. C. 569, 576.

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I have dealt at length with this aspect of the matter because of its prominence in the course of the argument and because of confusion which has arisen out of what, with all respect, I venture to think was the misapprehension on the part of Maugham J. of Russell J.'s decision. For reasons which I have given, I think that *In re Cassel* (1) is, as Wynn-Parry J. thought it was, an authority in principle governing the case of successive interests in a continuing annuity; and I am inclined also to think, after *Christie's* case (1) and *Crossman's* case (3) in the House of Lords, that it is an authority binding this court also. If so, that is the answer to Sir Andrew Clark's second argument in regard to *In re Cassel* (1) noted above, that is, that it was wrongly decided.

If I am wrong in that view, then I arrive at the first ground of the Crown's appeal: namely, that in the case of a continuing annuity, as in the case of aliquot shares of general income, the property passing within s. 1 of the Act is some share or portion of the corpus of the estate.

Accepting without reservation that in the case of aliquot shares of the general income of an estate there is, having regard to the language of s. 1 of the Act, and particularly the use of the words "settled or not settled," a "passing" of a corresponding part or share of the corpus of the estate, it does not, in my judgment, follow, either as a principle of construction of the statute (established by authority) or in logic, that there is a similar passing of corpus in the case of a continuing annuity. Indeed, in my opinion the principle underlying the former class of case is wholly inapplicable and cannot be sensibly related to the latter. In the case of one who has enjoyed for his life (say) one-fourth of the income of an estate, it seems to me in accordance with common sense and a natural use of language to say that he enjoyed for his life, that he was life tenant of, a fourth part of the (corpus of the) estate; and, accordingly, that upon his death a fourth part of the estate passed to the next successor. But no such language can, in my judgment, appropriately be used in the case of an annuitant. He is in no way concerned with changes in the yield of the estate: his right to his annuity will continue whatever income the estate may produce or (unless he has a right to look to income only) though the estate produce no income at all.

(1) [1927] 2 Ch. 275.

(3) [1937] A. C. 26.

(2) [1936] A. C. 569.

The share which (according to the suggested analogy) is to be attributed to the annuity will vary from half year to half year. If the general income is exactly equal to the annuity, the corpus passing on his death will be the entirety; and the result will be presumably the same when there is no income at all.

The suggested analogy in my view involves a confusion of right with remedy, and disregards the essential characteristics of an annuity: see, for example, *Bignold v. Giles* (1); and see also once more the language of Lord Russell of Killowen in *De Trafford v. Attorney-General* (2): "The present baronet's "right to an annual sum of 8,000*l.* gave him no right to the "receipt of any particular items of the annual income, or to "the income of any particular portion of the estates."

The basis of Sir Andrew Clark's contention lay in the fact that in the present case the annuitant has a charge upon, and therefore some kind of interest in, the corpus and every part of it; and can call upon the trustees, in the course of their administrative duties, to give effect to such rights. But, since the artificial process called the "slice" enjoined by s. 7, sub-s. 7 (b) has no application, the logical result of Sir Andrew Clark's emphasis on these rights of the annuitant seems to me to involve the result that, whatever the arithmetical relation at any point of time between the corpus of the estate and the first taker of a continuing annuity, the whole corpus passes on his death. It is true that, in one sense, he who is entitled to an aliquot share of general income is also "interested" in the whole estate and can call upon the trustees of the whole for due administration of the whole estate; but that right and that interest are irrelevant to the calculation what property passes on his death. The share of the whole which passes is determined by the necessary and direct relationship between a given proportion of the whole income (whatever it may be) and the like proportion of the corpus out of which the income arises—a relationship which is wholly absent in the case of an annuity.

It is true that the distinction may seem a fine one between the two cases and (more so) between the case of successive takers of a continuing annuity on the one hand, and the case of takers of successive but distinct annuities of the same amount on the other. But the distinction rests on the essential characteristics of an annuity and (in the case of successive

(1) 4 Drew. 343.

(2) [1935] A. C. 280, 290.

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takers of distinct annuities) on the circumstance that there is no passing of any property within s. 1, but an artificial passing within s. 2, which brings into play the statutory method of calculation provided by s. 7, sub-s. 7 (b). Nor, as it seems to me, would Sir Andrew Clark's contention, if accepted, entirely avoid apparent anomalies. If trustees, pursuant to a testator's directions, buy an annuity for a fixed period or for the period ending with the death of the longest liver of a number of persons, Sir Andrew Clark concedes that, on the death of the first recipient, duty could only be levied under s. 1 on the then value of the annuity as such. The distinction rests, he says, on the existence of the charge and administrative remedies which, in such a case as the present, the annuitant has. This I have already discussed. I am not entirely clear what would, on Sir Andrew Clark's argument, be the position where a single and continuing annuity is given to persons in succession, but such an annuity is not charged on any part of the estate. I conceive that the annuity would in such a case rank as a legacy, and that any annuitant would have the right to have the estate so administered that due provision was made for the annuity before any distribution of residue. In my view, the existence of such an administrative remedy cannot involve the "passing" of some specified portion of the estate. Sir Andrew Clark further conceded that, in the case of a continuing annuity for a specified period of years, the death of the first recipient did not give rise to any benefit to the general estate comparable with that derived, upon the happening of the like event, in the case of a continuing annuity for the joint lives of A. and B. and the life of the survivor. But the distinction, if otherwise sound, is irrelevant to this head of the Crown's appeal.

In opening his case Sir Andrew Clark observed that the existing practice of the estate-duty office might, and often did, work hardly upon the second annuitant, that is, if he only survived the first by a short time. In other cases, other methods of taxation have no less been said to work hardships. These are not matters with which we are concerned. In any case, the alleged hardship of the present case is one for which a testator can (and frequently does) make a provision. In truth, the object of the Crown in the present case is (if rightly entitled to it) to obtain a larger amount of duty. At any rate, if the practice hitherto adopted works unfairly between taxpayers and inadequately for the Crown, Parliament has never thought fit to take any of the frequent opportunities

offered to it to remedy those ills. In my judgment, the appeal ought to be dismissed.

SOMERVELL L.J. I have had the advantage of reading the judgment which I have just delivered for the Master of the Rolls and that about to be delivered by Jenkins L.J. I have nothing I wish to add on the point argued before Wynn-Parry J.

On the point set out in paragraph (a) of the notice of appeal and argued before us I think there is more force in the argument than do my brethren, on the following grounds: the authorities, in particular *Cowley (Earl) v. Inland Revenue Commissioners* (1) and *Christie v. Lord Advocate* (2) make it clear that, where life tenant succeeds to life tenant, or life renter to life renter, what passes within the meaning of s. 1 is the property producing the life interest. This is so whether the life interest is in the whole or an aliquot part. This indicates the principle on which the Act is based, namely, that property passes to a man in the sense of the words as they appear in the section when he is able to enjoy what that property produces, although he cannot expend the capital. So far as the application of the section is concerned, the same amount of property passes when life tenant succeeds to life tenant as when absolute owner succeeds to absolute owner. Maugham J. emphasized this very clearly in *In re Northcliffe* (3). What actually passes when life tenant succeeds to life tenant is the life interest. That life interest could be readily valued in the open market, and, if the successor were an old man, the value would be very much less than the fund in which he gets a life interest. What actually passes therefore is not the test. If it were, it is clear that what actually passed in this case was what was left of the one continuing annuity. I was at one time inclined to think that the principle I have set out was applicable in the sense contended for by Sir Andrew Clark as between successive annuitants.

I have, however, come to the conclusion, first, that so to hold would be inconsistent with the decision in *In re Cassel* (4), and that that case, for the reasons given by the Master of the Rolls, is probably now binding on this court. I have also, with some hesitation, come to the conclusion that the argument fails apart from authority. The artificial conception of the "slice" which has been found in the words of s. 7, sub-s. 7 (b)

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(3) [1929] 1 Ch. 327.

(2) [1936] A. C. 569.

(4) [1927] 2 Ch. 275.

C. A. must, if it is to apply here, be based on implication. There is of course no difficulty, when one is dealing with an aliquot share of income, in arriving at the value of the share of the fund producing the income. In the possible case, however, of a single continuing annuity, which is being paid in part out of capital, insuperable difficulties seem to me to arise in applying the method for which Sir Andrew Clark contends. One cannot imply a principle which would be in some cases unworkable. I therefore think that in this case what passed within s. 1 was the annuity to be valued on the basis set out by Jenkins L.J. at the conclusion of his judgment.

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JENKINS L.J. By the joint effect of his will and certain codicils to it, Henry, Duke of Norfolk, who died on February 11, 1917, (i.) devised and appointed to his wife as sole executor and trustee thereof certain freehold hereditaments for a term of 1,000 years on trust (*inter alia*) to pay out of the rents and profits thereof any annuity or annuities bequeathed by him, and (ii.) bequeathed to her as such sole executor and trustee an annuity of 2,000*l.*, to commence from his death and to continue to be payable during the joint lives of his brother Edmund Bernard, Viscount Fitzalan of Derwent. (hereinafter called "the late viscount") and the late viscount's son Henry Edmund Talbot (hereinafter called the "present viscount") and the life of the survivor of them, and to be paid to the late viscount during his life and after his death to the present viscount, subject in both cases to certain protective trusts which are not material for the present purpose.

The late viscount died on May 18, 1947, and the present proceedings concern the liability to estate duty on his death in respect of this annuity.

It is not in dispute that, on the true construction of the relevant provisions of the will and codicils, the interest in question is in truth one continuing annuity (charged on the estates comprised in the 1,000-year term) for the longer of the lives of the two annuitants, and cannot be regarded as comprising two successive annuities, the first ceasing and the second commencing on the death of the late viscount.

It has been the established practice of the estate-duty office, in cases in which one continuing annuity for two or more lives is given to two or more persons in succession and charged on property, to claim estate duty on the death of any annuitant, other than the last, on the footing that the annuity passes on

his death within the meaning of s. 1 of the Finance Act, 1894, and attracts duty on its principal value calculated actuarially for the residue of the period for which it is payable (that is, the lives or life of the remaining annuitants or annuitant); and to claim duty as on a cesser within the meaning of s. 2, sub-s. 1 (b) of an interest in the shape of the annuity, attracting duty under s. 7, sub-s. 7 (b) on the proportion of the capital of the property charged corresponding to the proportion of its income theretofore absorbed by the annuity, only on the death of the last annuitant.

This practice, whether it gives full effect to the legitimate claims of the revenue or not, obviously produces less duty than would be realized if a charge as on a cesser of the annuity under s. 2, sub-s. 1 (b) were made on the death of each annuitant, inasmuch as the "slice" of capital required to produce the annuity, which is chargeable with duty on this basis, must needs be greater, and where the age of the surviving annuitants or annuitant is advanced, very much greater, than the actuarial value of the annuity to which, under the existing practice, the claim on the basis of s. 1 is confined.

Accordingly, the estate-duty office, with a view to testing the validity of the practice which I have described, and if possible establishing a more lucrative interpretation of the law, claimed duty in the present case on the death of the late viscount as on a cesser under s. 2, sub-s. 1 (b) of an interest in the property charged, in the shape of his life interest in the annuity, bringing about a notional passing of the property charged with the annuity to the extent of the benefit accruing or arising by that cesser, and attracting duty at the appropriate rate on the "slice" of capital declared by s. 7, sub-s. 7 (b) to constitute the value of that benefit for this purpose.

The Public Trustee, who is now sole trustee of the will and codicils of the late duke, resisted this claim, contending that duty only became payable under s. 1 on the value of a continuing annuity of 2,000*l.* for the life of the present viscount, and applied to the court by originating summons for a decision of the question at issue.

The case was heard by Wynn-Parry J. who, in a considered judgment delivered on October 19, 1947, rejected the claim under s. 2, sub-s. 1 (b), and made an order declaring that on the death of the late viscount estate duty became payable on the basis contended for by the Public Trustee.

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The Crown now appeals from that order, and in arguing the appeal it has, with the leave of the court, and the consent of the Public Trustee as respondent, added to the claim under s. 2, sub-s. 1 (*b*) a claim, not advanced before Wynn-Parry J., to the effect that, even if recourse cannot be had to s. 2, sub-s. 1 (*b*), nevertheless, the admitted passing of the annuity under s. 1 attracted duty not merely on the actuarial value of the annuity for the life of the present viscount but on a capital "slice" of the property charged with the annuity, ascertained as under s. 7, sub-s. 7 (*b*), the property which "passed" by virtue of the "passing" of the annuity being nothing more or less than this capital "slice."

I will deal first with the claim as argued before Wynn-Parry J. He in effect held himself bound by the decision of the House of Lords in *Cowley (Earl) v. Inland Revenue Commissioners* (1), as applied by Russell J. in *In re Cassel* (2), to hold (*a*) that there was an actual passing of the annuity on the death of the late viscount under s. 1; (*b*) that ss. 1 and 2 are mutually exclusive and that the application of s. 1 accordingly precluded recourse to s. 2, sub-s. 1 (*b*); and (*c*) that, accordingly, duty was only exigible under s. 1 as on a passing of the annuity, and could not be claimed under s. 2, sub-s. 1 (*b*) as on the cesser of an interest. In my judgment the judge was clearly right in the conclusion to which he came, and the principles by which he was guided in arriving at it are no less binding on this court than they were upon him.

It is clearly not open to this court to depart from the construction placed on ss. 1 and 2 over fifty years ago by the House of Lords in *Cowley (Earl) v. Inland Revenue Commissioners* (1) and followed by their Lordships in the comparatively recent case of *De Trafford v. Attorney-General* (3). I need only refer to one passage from the well-known speech of Lord Macnaghten in the former case, where he says (4): "I am, therefore, compelled to differ from the Court of Appeal at the very outset. I think the present case falls within s. 1. I think it belongs to a class of cases which the authors of the Act had directly in view when they framed that section. Now, if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed, 'With regard to property passing on death, be it enacted as follows.' Section 2

(1) [1899] A. C. 198.

(3) [1935] A. C. 280.

(2) [1927] 2 Ch. 275.

(4) [1899] A. C. 198, 212.

" might with equal propriety be headed, ' And with regard
 " ' to property not passing on death, be it enacted as follows.'
 " I cannot, therefore, agree with Rigby L.J. when he says
 " that s. 2 is a provision ' explanatory ' of s. 1. In my opinion
 " the two sections are quite distinct, and s. 2 throws no light on
 " s. 1. But, then, no doubt s. 2 speaks of ' property in which
 " ' the deceased . . . had an interest ceasing on the death
 " ' of the deceased.' And that, it may be said, was just
 " the position of the second earl with regard to the Mornington
 " settled estates. So it was. But s. 2 does not apply to an
 " interest in property which passes on the death of the deceased.
 " That is already dealt with in the earlier section. For
 " property in the lifetime of the deceased subject to a charge
 " or interest which ceased on the death must of course pass
 " free from that charge or interest. And, so passing, it must
 " of course be valued accordingly. That is s. 1. You do
 " not want s. 2 for that. You cannot resort to s. 2. For that
 " would be giving the duty twice over. The Crown cannot
 " have it both ways. Double duty is forbidden by the Act."

Applying these principles to the case of a continuing annuity in the form of an annual sum of varying amount given by a testator to defray the outgoings and upkeep of a leasehold house settled by his will on successive life tenants, Russell J. in *In re Cassel* (1), as I think rightly, and indeed inevitably, held that on the death of the first life tenant there was an actual passing under s. 1 of property consisting of the right to enjoy the benefit of the annual sum in question, and that s. 2 sub-s. 1 (b) had no application.

It is not disputed on the part of the Crown that in the present case there was an actual passing of the annuity under s. 1, and that, on the principles stated in *Cowley (Earl) v. Inland Revenue Commissioners* (2), this has the effect of excluding the application of s. 2, sub-s. 1 (b) so far as the annuity itself is concerned. It is, however, argued that it is nevertheless open to the Crown to claim in the alternative that, so far as the property charged with the annuity is concerned, the late viscount's life interest in the annuity was an interest in that property which ceased on his death within the meaning of s. 2, sub-s. 1 (b), and, accordingly, brought about a notional passing of the property on his death to the extent to which a benefit accrued or arose by the cesser of such

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interest, and thus attracted duty on a "slice" of the capital of the property ascertained as provided in s. 7, sub-s. 7 (b).

In my judgment this alternative contention is wholly inadmissible. As pointed out by Wynn-Parry J., it was, in effect, considered and rejected by Russell J. in *In re Cassel* (1); and it appears to me to have been rightly and necessarily so rejected for the simple reason that it involves doing the very thing which, according to *Cowley (Earl) v. Inland Revenue Commissioners* (2), is not to be done, that is to say, treating an actual passing of property under s. 1, as if it were a cesser of an interest in property under s. 2, sub-s. 1 (b), which in the words of Lord Macnaghten (3) does not refer "to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass." Once the actual passing of the annuity under s. 1 is established, the cesser of the late viscount's life interest in the annuity must be regarded merely as the event which brought about such passing, and not as the cesser of an interest within the meaning of s. 2, sub-s. 1 (b).

Moreover, it seems to me that, even if the cesser of the late viscount's life interest in the annuity could properly be regarded as a cesser of an interest in the property charged with the annuity within the meaning of s. 2, sub-s. 1 (b), it would not be a cesser by reason of which any benefit accrued or arose within the meaning of s. 2, sub-s. 1 (b), read in conjunction with the formula for the valuation of such a benefit provided by s. 7, sub-s. 7 (b). Section 2, sub-s. 1 (b) in my judgment contemplates a cesser of some interest in property or the income of it which has the effect of discharging the property from the interest so ceasing for the benefit of the persons entitled to it subject to such interest. In other words, the benefit contemplated by the section is a benefit which accrues or arises to the property by reason of the cesser of the interest.

This accords with the views expressed by Lush J. in *Attorney-General v. Watson* (4), and is, I think, borne out by the method of valuation prescribed by s. 7, sub-s. 7 (b), the value of the "slice" ascertained in accordance with that provision being an appropriate index of the benefit accruing or arising to property, or to persons entitled to property, when an interest, such as an annuity, for one life to which it was formerly subject ceases by the death of the annuitant; but, so far as

(1) [1927] 2 Ch. 275.

(3) *Ibid.* 213.

(2) [1899] A. C. 198.

(4) [1917] 2 K. B. 427, 431, 432.

I can see, is wholly inappropriate to a case in which property is charged with a continuing annuity which does not cease on the death of the person for the time being entitled, but remains on foot for the benefit of the next taker. In such a case, no benefit whatever has accrued or arisen to the property, which remains subject to precisely the same annual payment as before.

It was contended for the Crown that a benefit did accrue or arise in the present case in the shape of the passing of the annuity to the present viscount. But that in my view is not a benefit which can be taken into account for the purposes of the Crown's alternative claim under s. 2, sub-s. 1 (b). It is a benefit produced by the actual passing of the annuity under s. 1, and admittedly that is the only section which can be called in aid so far as the annuity itself is concerned. The alternative claim under s. 2, sub-s. 1 (b) necessarily involves separating the late viscount's life interest in the annuity from the present viscount's life interest in it, treating the former as a distinct and separate interest in the property charged ceasing on the death of the late viscount within the meaning of s. 2, sub-s. 1 (b), and finally demonstrating that, by reason of the cesser of that interest, as distinct from the actual passing of the annuity under s. 1, a benefit accrued or arose. Even if the first two steps in this process were legitimate, as in my judgment they clearly are not, the third would, as it seems to me, present an insurmountable obstacle.

The issue is perhaps obscured by the fact that the passing of the annuity under s. 1 was here brought about by the cesser of the late viscount's life interest in it. If an annuity of like duration had been given to the late viscount absolutely, so that the right to receive it during the residue of the present viscount's life had passed on his death as part of his free estate, there could have been no question of any claim for duty otherwise than under s. 1. The fact that the annuity was settled on the late and present viscounts successively for life lends colour to the claim under s. 2, sub-s. 1 (b); but in truth it is just as much, and just as exclusively, a s. 1 case as it would have been in the hypothetical circumstances I have mentioned.

It was argued, though somewhat faintly, on the part of the Crown that the reduction in the actuarial value of the annuity by the dropping of one of the two lives on which it depended (as to which reduction there was in fact no evidence) constituted a benefit within the meaning of s. 2, sub-s. 1 (b) which fell to

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be valued according to the wholly irrelevant formula provided by s. 7, sub-s. 7 (b). I find myself unable to accept this contention.

I am accordingly of opinion that the claim under s. 2, sub-s. 1 (b) fails; first, because it is inadmissible according to the principles laid down in *Cowley (Earl) v. Inland Revenue Commissioners* (1), and, secondly, because the continuing character of the annuity in any case seems to me to make ss. 2, sub-s. 1 (b) and 7, sub-s. 7 (b) wholly inappropriate according to what appears to me to be the true construction of those provisions.

I now turn to the new contention raised on the part of the Crown in this court, to the effect that, even if duty can only be claimed under s. 1 as on an actual passing of the annuity on the death of the late viscount, the property which passed was not simply the right to receive the annuity during the residue of the life of the present viscount, but the proportion of the corpus of the property charged corresponding to the proportion of the income thereof required to produce the annuity.

The argument in support of this contention proceeds in this way: it is pointed out (and rightly) that where the income of property is divided into shares which are settled on persons in succession, the death of any person entitled to a life interest in any one of those shares occasions a passing under s. 1 of the corresponding share of capital: see *In re Northcliffe* (2) and *Christie v. Lord Advocate* (3).

It is next alleged that the interest of an annuitant in respect of an annuity charged on property is equivalent to a life interest in the share of capital required to produce the annuity ascertained by reference to the proportion borne by the amount of the annuity to the whole income of the property charged. The conclusion is then adduced that, on the authorities to which I have just referred, it follows that the property which passes under s. 1, when a continuing annuity charged on property passes on a death within the meaning of that section, is not simply the annuity for the residue of its prescribed duration (which is clearly all that passes in fact), but the proportion ascertained as above of the corpus of the property charged with the annuity.

This contention seems to me contrary to all principle. An

(1) [1899] A. C. 198.

(3) [1936] A. C. 569.

(2) [1929] 1 Ch. 327.

annuity charged on property is not, nor is it in any way equivalent to, an interest in a proportion of the capital of the property charged sufficient to produce its yearly amount. It is nothing more or less than a right to receive the stipulated yearly sum out of the income of the whole of the property charged (and in many cases out of the capital in the event of a deficiency of income). It confers no interest in any particular part of the property charged, but simply a security extending over the whole. The annuitant is entitled to receive no less and no more than the stipulated sum. He neither gains by a rise nor loses by a fall in the amount of income produced by the property, except in so far as there may be a deficiency of income in a case in which recourse to capital is excluded.

On the other hand, a life interest in a share of the income of property is equivalent to, and indeed constitutes, a life interest in the share of the capital corresponding to the share of income. The life tenant enjoys the share of income whatever it may amount to, and his interest, viewed as a life interest in capital, consists of a constant proportion of the whole property, whether the income is great or small, and whether the capital value of the property rises or falls. The property which changes hands on his death (or in other words passes under s. 1) thus clearly consists of the designated share of capital, which then passes from his beneficial enjoyment to that of another. An annuity cannot be so related to any fixed proportion of capital: see *De Trafford v. Attorney-General* (1). The proportion of the total income required to produce the annuity, and with it the corresponding share of capital, varies from year to year according to the total income produced by the property charged. The Crown's contention thus involves substituting for the annuity a "slice" of capital ascertained by means of a calculation on the lines prescribed by s. 7, sub-s. 7 (b) for ascertaining the benefit accruing or arising by the cesser of an interest, with a result depending on the rate of income produced by the whole fund over whatever period might be selected for the purposes of the calculation. The "slice" so ascertained would bear no relation whatever to the legal rights of the annuitant, and its ascertainment would amount to the construction for estate-duty purposes of a wholly fictitious and notional proprietary interest for which there is no warrant whatever in the relevant legislation.

(1) [1935] A. C. 280.

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It was suggested that authority for this method of charging duty on the passing of a continuing annuity under s. 1 was to be found in the comments on *In re Cassel* (1) made by Maugham J. in *In re Northcliffe* (2) and by Lord Russell himself in *Christie v. Lord Advocate* (3). In my judgment these comments, properly understood, provide no such authority. The peculiar difficulty in the *Cassel* case (1), to which reference is made, consisted not in deciding what property passed—Russell J. made it abundantly plain that what passed and what had to be valued was simply the right to receive the benefit of the annual payment—but in valuing the property which passed, that is to say, the right to receive the benefit of the annual payment, owing to its fluctuating amount and other peculiar characteristics. This is, I think, made clear by the further observations of Lord Russell on the *Cassel* case (1) in *Inland Revenue Commissioners v. Crossman* (4).

Annuities charged on property which cease on death and fall within s. 2, sub-s. 1 (b) being charged to duty on the “slice” basis prescribed by s. 7, sub-s. 7 (b), the Act might consistently have prescribed a similar basis of charge with respect to continuing annuities which pass on death under s. 1. But no such provision has in fact been made, and it is for the legislature and not this court to supply it should that be considered desirable. In the absence of any such special provision, the property which attracts duty on a passing under s. 1 is simply the property which passes; and the property which passed in the present case was the annuity and nothing else. The annuity must accordingly be valued for duty purposes simply as consisting of the right to receive 2,000*l.* a year from the death of the late viscount for the residue of the life of the present viscount. For these reasons, I would dismiss the appeal.

Appeal dismissed.

Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Nicholl, Manisty, Few & Co.*

(1) [1927] 2 Ch. 275.

(2) [1929] 1 Ch. 327.

(3) [1936] A. C. 569.

(4) [1937] A. C. 26, 68.

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[1948 L. 1045.]

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Practice—Garnishee order—Solicitor's lien—Charging order—Whether lien attachable to money in client account—Sum paid on completion by successful purchaser in specific performance action—Whether "recovered or preserved" in the action—Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37) s. 69.

Applied. In r
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[1952] 1 Ch. 32

A purchaser in an action for specific performance obtained judgment and an order that the defendant vendor should convey to the plaintiff the property in suit on payment by the plaintiff of a stated sum. Completion was effected, the plaintiff paying the sum to the defendant's solicitors, who paid it into their "client account." The plaintiff then obtained a garnishee order nisi in respect of his costs to attach all debts due by the defendant's solicitors to the defendant. The defendant's solicitors, who had not rendered a bill of costs to their client, took out a summons for a charging order on the sum paid by the plaintiff, under s. 69 of the Solicitors Act, 1932. On the hearing of this summons, and of the summons to make the garnishee order absolute,

Held, (1.) that the solicitors had a lien on the money in the client account to the extent of the defendant's debt to them, and that the garnishee order could only be made absolute subject to that lien. *Plunkett v. Barclay's Bank Ltd.* [1936] 2 K. B. 107; *Miller v. Atlee* (1849) 13 Jur. 431 considered. *Stumore v. Campbell & Co.* [1892] 1 Q. B. 314 distinguished.

(2.) That the sum paid by the plaintiff on completion was not money "recovered or preserved" by the solicitors within the meaning of the section, and that the solicitors accordingly had no right to a charging order in respect of it. *In the Estate of White* (1933) 49 T. L. R. 325 distinguished.

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On February 13, 1950, the plaintiff (purchaser) in an action for specific performance obtained judgment against the defendant (vendor), and it was ordered that the plaintiff, on payment to the defendant of the sum of 268*l.*, was entitled to a conveyance of the property in suit, and that the defendant should pay the plaintiff's taxed costs. Completion was effected on April 17, the plaintiff paying the 268*l.* to the defendant's solicitors, who paid it into their "client account" at the bank. On the same day the plaintiff obtained a garnishee order nisi in respect of his costs (taxed at about 268*l.*) to attach all debts due from the defendant's solicitors to the defendant. The defendant's solicitors then took out a summons for a

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charging order under s. 69 of the Solicitors Act, 1932 (1). This summons, and the plaintiff's summons to make the garnishee order absolute, were heard together. The defendant's solicitors had not rendered a bill of costs to their client.

Lindner for the defendant's solicitors. The sum paid by the plaintiff on completion was money "recovered or "preserved" in the action, and a charging order can be made on it. That order will take precedence over a garnishee order. [He referred to *James Bibby, Ltd. v. Woods* (2), and to *Cordery on Solicitors* (4th ed.), p. 483, et seq.] In *In the Estate of White* (3), the plaintiff's solicitor was held to be entitled to a charging order on a sum passing to the plaintiff on an intestacy, although the plaintiff, who had propounded a will, had failed in her suit; the circumstances here are exactly similar. A solicitor's right is prior in time, as a judgment creditor has no right to attach a debt until judgment. [He referred to the notes to Or. 45, r. 2, in the Annual Practice; *Shippey v. Gray* (4); *Dallow v. Garrold* (5); and *Cole v. Eley* (6).]

A garnishee is in no better position than a judgment debtor: if the latter cannot claim the money from the garnishee, neither can the creditor.

[HARMAN J. If the money is in the hands of the solicitors, it would seem that they have a lien on it, and that a charging order would be unnecessary for their protection.]

A charging order is desirable ex majore cautela. Such an order was made in *In re Born* (7), although there was a common law lien on the fund concerned.

Skone James for the plaintiff. This was not money "recovered or preserved" in the action: the court cannot make a charging order unless there is an element of salvage in the case: *Greer v. Young* (8); *Pierson v. Knutsford Estates Co.* (9); *In re Wadsworth* (10); *In re Humphreys* (11);

(1) Solicitors Act, 1932, s. 69:
"Any court in which a solicitor
"has been employed to prosecute
"or defend any suit, matter or
"proceeding may at any time
"declare the solicitor entitled to
"a charge on the property
"recovered or preserved through
"his instrumentality for his taxed
"costs in reference to that
"suit"

(2) [1949] W. N. 244;
65 T. L. R. 416.
(3) (1933) 49 T. L. R. 325.
(4) (1880) 49 L. J. (Q. B.) 524.
(5) (1884) 14 Q. B. D. 543.
(6) [1894] 2 Q. B. 180, 350.
(7) [1900] 2 Ch. 433.
(8) (1882) 24 Ch. D. 545.
(9) (1884) 13 Q. B. D. 666.
(10) (1885) 29 Ch. D. 517.
(11) [1898] 1 Q. B. 520.

The Dirigo (1). In the present case the order was not that the plaintiff should pay the money, but that he should receive a conveyance on payment of the money. In *Stumore v. Campbell & Co.* (2) solicitors, who had a client's money in their hands, were held not to have a lien on it.

[HARMAN J. In that case the money had been deposited with the solicitors for a special purpose, which had failed.]

A solicitor has a special right in respect of moneys recovered in an action, which he can enforce by a charging order, but there is no right to a general lien on money in a solicitor's hands.

Money in a client account is trust money : see du Parcq J.'s observations in *Plunkett v. Barclay's Bank. Ltd.* (3). Such money cannot be paid out to the solicitor and does not become due to him until he has rendered his bill to the client. See r. 7 of the Solicitors' Accounts Rules (St. R. & O. 1944, No. 781). If there were a general lien, *Stumore v. Campbell & Co.* (2) would have been decided otherwise.

[HARMAN J. In Cordery on Solicitors (4th ed.) at pp. 455-456, it is stated that a general lien attaches to money in a solicitor's hands ; the authority for this is apparently *Miller v. Atlee* (4). I suggest that the lien attaches to money in a client account even though the solicitor could not get a charging order because he has not delivered his bill.]

If a solicitor, by one way or another creates a trust as against himself, he cannot have a lien.

HARMAN J. [after stating the facts]. The first question is whether the plaintiff's claim is good subject-matter for garnishee proceedings. By a garnishee order the creditor cannot be put in a better position than the judgment debtor himself. Therefore if the defendant could not claim this money as his as against his solicitors, neither can the plaintiff, who is the creditor, attach it in the hands of the solicitors, because it is not a debt due and owing from the solicitors to the defendant. This money is in a client account. Such an account has been compulsorily kept since 1945 by solicitors under the Solicitors' Accounts Rules made by the Council of the Law Society under the Solicitors Act, 1932. A "client account" is there defined as "a current or deposit account at a bank in the name of the solicitor, in the title of which

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(1) [1920] P. 425.

(2) [1892] 1 Q. B. 314.

(3) [1936] 2 K. B. 107, 117.

(4) (1849) 13 Jur 431.

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"the word 'client' appears"; and, under the rules, the solicitor is bound to pay the money into the client account, and he may only pay into it clients' money or money belonging to the solicitor necessary for opening the account and certain other cheques. He may only draw clients' money from a client account when it is required either to pay the client, or to pay a debt due to the solicitor from the client—that is not a debt, I think, for costs—or money drawn on the client's authority, or money for his costs after he has told his client that he intends to draw on the client account for his bill.

In *Plunkett v. Barclay's Bank, Ltd.* (1), in which the point for decision was different, du Parcq J. said: "The sum of "48l. 5s. od., which was the only money paid into the account"—that is a client account—"had been paid into the bank "in the shape of notes and coin. It followed that unless the "plaintiff had broken the law, which ought not to be assumed, "the sum of 48l. 5s. od. was 'money held or received on account "of a client' within (a)"—that is, of r. 4. "It was "accordingly trust money, as is the money recovered by a "judgment creditor in an action which he brings as trustee "for another person (see *Roberts v. Death* (2)), or the money "paid by a stockbroker into an account into which he pays "nothing but moneys received on behalf of clients: see "*Hancock v. Smith* (3)."

Therefore, although that was not the point which he was deciding du Parcq J. did assume that the money in a client account is trust money, and so, in a sense, no doubt it is. But the question remains whether, notwithstanding that, a solicitor has any lien on it. Mr. Skone James argued that he has not, mainly, I think, on the authority of *Stumore v. Campbell & Co.* (4). There the plaintiff applied to attach a sum of money in the hands of a firm of solicitors which had been deposited with them for a special purpose which had failed. The solicitors claimed that they had a lien on that money against the debtor notwithstanding the failure of the special purpose, because he owed them money in respect of litigation on some other subject, and therefore they said that, if he claimed the return of the money, they had a right of set-off. But it was held that, as the special purpose had failed, the money in their hands was trust money and no lien attached to it.

(1) [1936] 2 K. B. 107, 117.

(2) (1881) 8 Q. B. D. 319.

(3) (1889) 41 Ch. D. 456.

(4) [1892] 1 Q. B. 314, 316.

Lord Esher M.R., reversing the judgment of A. L. Smith J., said: "It appears that some money was placed in the hands of the defendants, who are solicitors, for a particular purpose. So long as that purpose existed there was a trust imposed on them, and they were bound, if they accepted the money at all, to employ it or lay it out in the particular way indicated by the trust. That trust failed, and the result of that failure was that another trust arose immediately to pay back the money to the person who gave it. It is admitted that, being trustees, no lien would attach in their favour, because the money was entrusted to them for a specific purpose. *Brandao v. Barnett* (1) is conclusive on this point." So that there it was admitted that there was no lien, but merely a right of counterclaim in an action. The reason was that this was money entrusted to the solicitor for a specific purpose, and that, on failure of the purpose, there was, of course, a resulting trust to the person who entrusted it. That seems to me to be quite a different case from the present: here the money was not entrusted to the solicitor for any specific purpose: it was paid to him in the ordinary course of his business as solicitor for the client. He receives it as the client's agent, as does any other solicitor, and he pays it into the client account as he is bound to do. But the question is whether that releases it from his lien.

Mr. Skone James says that, so long as a solicitor has not delivered his bill and notified the client of his intention to withdraw the money to pay it, he has no lien, because such a course is necessary before he can take the money out of the account. I agree that he cannot take the money out of the account, because the rules say that he may not until he has taken certain steps; but I cannot agree that therefore he has no lien on it, as any solicitor has on any client's property in his hands until his bill is paid.

It is difficult to find authority for the proposition that the ordinary solicitor's retaining lien, which goes back, of course, to a time long before the Solicitors Acts, is a thing which extends to money; but in Cordery on The Law Relating to Solicitors (4th ed.) p. 455, where the author is discussing solicitors' liens, he points out that they exist in two forms: "one is a right to retain property already in his possession until he has been paid costs due to him in his professional character; the other is a right to ask the court to direct

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(1) (1846) 12 Cl & F. 787.

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"that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery." Then he points out that the latter right is a statutory one. The former (which he calls the "retaining lien") still remains and is independent of the statute, and he says: "The retaining lien is founded on the general law of lien which springs from possession, and is in general governed by the same rules as other cases of possessory lien." There is then set out a list of items to which the lien can attach, ending with "or money, but money being divisible the lien only attaches on the amount actually due."

The authority for that is *Miller v. Atlee* (1), where the decision appears merely to have been that there was no lien in favour of a solicitor on any sum in hand beyond the amount of his debt. It was assumed or conceded that the solicitor had a lien on the money to the extent of his debt. I do not see why a solicitor, if he has money in his possession, has not got an ordinary lien on it. The fact that he puts it in a client account does not mean that it is any the less his account, although it is earmarked in that way; and it seems to me that the client could not demand that the money be handed over. It would be an answer to say: "You have not paid my bill and I shall not pay you out your money until you have." Consequently, it seems to me that, as the debtor could not obtain the money from the solicitor without paying his bill, a creditor cannot attach it, and therefore I must discharge the garnishee order nisi against this money to the extent of the sum due under the solicitor's lien.

If this view is wrong, and the money in the "client account" is in trust and no lien attaches on it, then there arises the question on the other summons: whether the statutory right under the Solicitors Act, 1932, applies so as to give the solicitors a charging order under s. 69 of the Act. This empowers the court to declare a solicitor entitled to a "charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit." That, of course, is a limited right, and the question is whether the sum in question is good subject-matter for such an order, as being "money recovered or preserved" through the instrumentality of the solicitor in the suit. It is a somewhat illogical claim, because the money has come into the solicitors' possession in spite of their best efforts on behalf of

their client. They resisted the plaintiff's claim for specific performance ; they refused, until ordered, to convey ; they did not want the money ; the money was, as it were, forced upon them. The order was, not that the plaintiff should pay the money, but that on payment he was entitled to call for a conveyance ; and he paid the money to the solicitors accordingly. In my judgment, that is not in any reasonable sense of the term " money recovered or preserved " in the suit by the solicitors.

Mr. Lindner argued the contrary, relying mainly on *In the Estate of White* (1), in which it was held that a share under an intestacy was " money recovered or preserved " by the solicitor of a plaintiff propounding the will. The probate suit was unsuccessful because the will was rejected, and, as a consequence of the resulting intestacy, a sum of money became due to the plaintiff, notwithstanding that she was unsuccessful in her suit. Lord Merrivale P. said (2) : " The property in question is the estate of a deceased man and " it had not vested by any judicial or administrative act " in any other person. There were persons who had inchoate " rights, and one of the persons who had these rights was the " deceased's sister, who issued a writ in the Probate Division." She claimed, as he says, under the wills, but, as the court pronounced against them, she became entitled as under an intestacy. I rather doubt whether her rights were inchoate : they were uncertain, but not inchoate. It does not seem to me that that case is authority for saying that money paid to the defendant against his will in a specific performance suit, as a result of his losing it, is " money recovered or " preserved." In view of my decision on the first summons, this question does not really arise ; but my view is that the solicitors are not entitled to a charging order.

In the result, the garnishee order must be subject to the right of the solicitors to a lien in respect of the sum properly due to them from the defendant for costs at the date of the order nisi ; and there must be an inquiry to ascertain the amount of that sum. The summons for a charging order must be dismissed.

Orders accordingly.

Solicitors : *Woodroffes ; Speechly, Mumford and Craig, for Woodbridge & Sons, Uxbridge.*

(1) 49 T. L. R. 325.

(2) *Ibid.* 326.

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[1949 C. 3575]

Apl. 25.Evershed M.R.,
Asquith and
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Guardianship of infants—Religious upbringing—Parents both dead—Father's common-law right to dictate religious upbringing of child—Whether still subsisting—Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45) s. 1.

An infant's father had been a Roman Catholic and his mother a Protestant. Before the marriage in 1942 the mother had signed a declaration that the children of the marriage should be brought up as Roman Catholics. The infant was born in 1943 and baptized in a Roman Catholic Church. His father was killed in action in 1944 and his mother died in 1947. Shortly before her death the mother had expressed the wish that the infant should be brought up in the Protestant faith in accordance with the Congregationalist denomination. For the past two and a half years the infant had been living with his maternal grandparents. The paternal grandparents applied to have the custody of the child given to them in order that they might bring him up in the Roman Catholic faith in accordance with the wishes of his father. Wynn-Parry J. made an order directing that the infant should remain in the custody of his maternal grandparents. The paternal grandparents appealed. They contended that, where both the parents of an infant were dead, s. 1 of the Guardianship of Infants Act, 1925, had not curtailed the common-law right of a father to dictate the religious upbringing of his child.

Held, that the effect of s. 1 of the Guardianship of Infants Act, 1925, was to take away from a father his right at common law to dictate the religious upbringing of his child, not only when both parents were alive but also when they were both dead. Accordingly, as there had been no misdirection, the order which had been made by Wynn-Parry J. must stand.

Hawksworth v. Hawksworth (1871) L. R. 6 Ch. 539, *In re Thain* [1926] Ch. 676, *In re J. M. Carroll* [1931] 1 K. B. 317 considered.

APPLICATION for leave to appeal out of time from an order of Wynn-Parry J.

An infant, Patrick Michael Collins, was the only child of William Percival Collins and his wife Blanche Collins. The father was a Roman Catholic and the mother a Protestant. Before the marriage on September 6, 1942, the mother had signed a declaration in the usual form that the children of the marriage should be brought up as Roman Catholics. The infant was born on September 29, 1943, and baptized in a Roman Catholic church. The infant's father was reported missing on war service in August, 1944. Shortly afterwards

the mother contracted tuberculosis, and, although she survived another three years, she spent the greater part of that period in hospital. While she was in hospital the infant lived for the most part with his paternal grandparents, Mr. and Mrs. Collins, the present appellants. Shortly before her death his mother took the infant to live with her own parents, the present respondents, and she expressed the wish that he should be brought up in the Protestant faith according to the Congregationalist denomination which was her own faith. The mother died on November 21, 1947, and for the two and a half years before the present application the infant had been living with his maternal grandparents who were bringing him up as a Protestant.

The infant's paternal grandparents by this application asked to have the custody of the infant given to them, in order that they might bring him up as a Roman Catholic in accordance with the wishes of his father, since, if he remained in the custody of his maternal grandparents, he would be brought up in the Protestant faith.

Both the paternal and maternal grandparents were devoted to the infant, and no suggestion had been made that either of their homes was in any way unsuitable, or that he would not be well cared for with whichever family he lived.

Wynn-Parry J. made an order directing that the infant should remain in the custody of his maternal grandparents. The paternal grandparents appealed.

O'Sullivan K.C. and *J. C. Leonard* for the paternal grandparents. This infant should be brought up in the religion of his father. The common-law right of a father to dictate the religious upbringing of his child which was enunciated in *Hawksworth v. Hawksworth* (1) has never been abrogated. That right was not touched by the provisions of the Guardianship of Infants Act, 1886: see *In re Scanlan* (2). Section 1 of the Guardianship of Infants Act, 1925 (3) did not cut down

(1) (1871) L. R. 6 Ch. 539.

(2) (1888) 40 Ch. D. 200.

(3) Guardianship of Infants Act, 1925, s. 1: "Where in any proceedings before any court . . . the custody or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consider-

ation, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

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the father's common-law right where its exercise does not conflict with the rights of the mother : *In re Thain* (1). Other things being equal, the rights of the father still prevail and he is still entitled to dictate the religious upbringing of his child : see *In re Carroll* (2). That right is recognized by the Custody of Children Act, 1891, s. 4. The judge misdirected himself. He should have taken into consideration the arrangement made between the parents before their marriage as to the religion of the child, the fact that the child had been baptized as a Roman Catholic, and the desire of the father that he should be brought up in the father's own faith. The judge paid insufficient attention to these moral and religious considerations. He only considered material matters. The judge has in fact decided that the maternal grandparents of this infant are entitled to change his religion. The fact that this child has been living for two and half years with his maternal grandparents should not be allowed to decide his religion and to determine his whole future life. The judge gave insufficient weight to these spiritual considerations.

J. C. Leonard, following. The religion of the child once determined cannot lightly be changed. The mother here agreed that this infant should be brought up in the religion of his father. Having made that agreement, she was not entitled to change the infant's religion. The judge was not entitled to hold that the grandparents could defeat the wishes of the infant's father as to his religious upbringing. The judge should have given effect to those wishes either by making an order that the custody of the infant should be given to the paternal grandparents or by making it a condition of the custody remaining with the maternal grandparents that the infant should be brought up as a Roman Catholic.

C. A. J. Bonner, for the maternal grandparents, was not called upon to argue.

EVERSHED M.R. This case comes before us by way of appeal from a decision of Wynn-Parry J. in Chambers given on December 21, 1949. I say by way of appeal, because a preliminary point has been taken on behalf of the maternal grandparents, namely, that the appeal is out of time, the order made having been an interlocutory order. That it was an interlocutory order is plain having regard to

(1) [1926] Ch. 676.

(2) [1931] 1 K. B. 317.

the decision of this court in the recent case of *Chinchen v. Chinchen* (1). Mr. O'Sullivan and Mr. Leonard for the paternal grandparents have therefore first asked that the time for appealing may be treated as extended so that we may entertain the appeal so out of time.

The case relates to the custody of a boy aged $6\frac{1}{2}$ years, and, as is to be expected, those who have brought this matter before the Court of Appeal feel (and in this case they feel without any motive which deserves any kind of criticism) the matter to be one of the utmost importance. I think that on general principles and in the public interest the court should always be a little slow to entertain an appeal in this class of case which relates to infants, for the decision in such cases is so very much a matter of the judge's discretion.

None of us who have had to exercise this discretion can forget how exceedingly anxious and difficult it is, and how great the responsibility. No judge can claim to exercise an ideal wisdom in these matters, but the jurisdiction which he has to exercise is that which devolves upon him from the Sovereign as *parens patriae*. Parents would not, after all, assert that they were never wrong in any decision which they made with regard to their own children; but few parents would desire their own decisions to be reviewed by others. I mention these matters because, although I propose to determine this appeal on the preliminary issue, I desire to make it quite plain that I do so having heard at considerable length, a discussion on the case. That discussion has satisfied me, first, that the judge did not in any respect misdirect himself; and, secondly, as a consequence, that, if we were to go more fully into this matter, there is nothing which would justify this court in interfering with the exercise by the judge of his discretion. Whether another judge might have reached another decision is beside the point, though I must not be taken to be suggesting that I would myself have decided the case otherwise. Having heard the interesting and careful argument which has been put before us, I am satisfied that, if we were to go more fully into the matter, there is no case which would justify the Court of Appeal in interfering with the exercise by the judge of his discretion.

[His Lordship stated the facts and continued:] The claims of the rival grandparents presented the judge with a problem of great difficulty. On the one hand, the paternal grandparents

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were pressing to have the custody of the boy given to them in order that he might be brought up as a Roman Catholic ; on the other hand, the maternal grandparents claimed to retain the boy where he then was. No wonder the judge said that it was a fine balance. But he came to the conclusion that the best thing to do, and the right order to make, was to allow this little boy to remain where he was ; and, although the order makes no express reference to religious upbringing, I think that everybody agrees that, so long as he remains where he is, he will not in fact be brought up in the Roman Catholic faith.

Mr. O'Sullivan has argued that the judge misdirected himself in this matter ; that we ought to allow this appeal to proceed ; and that, if we did, we should, because of that misdirection, interfere with his discretion. Mr. O'Sullivan has put the case in two ways, one more bold than the other. The less bold he formulated thus : the judge, he says, ought to have considered the arrangement between the spouses as to the religion of the child. That is a reference to the arrangement made that the child should be brought up in the Roman Catholic faith. Further, the judge ought to have considered the fact that the child had been baptized into the Roman Catholic Church. Finally, he ought to have taken into account the desire of the father that the child should be brought up in his (the father's) own faith, that is, the Roman Catholic faith. Mr. O'Sullivan is not saying that nothing else should be considered ; but he says that those things ought to have been considered, and that the judge did not consider them, or did not adequately weigh them.

The note of the judgment which we have is a brief one, for which we are indebted to Mr. Bonner. The judge stated, according to this note : " The cases recognize that on the " question of religion the court has firmly refused to choose " between different religions and pronounce on their respective " merits." Mr. O'Sullivan says that he went wrong there, because, on the question which of two religions ought to be preferred, he washed his hands of the whole affair and would not consider it. I am quite sure that the judge did not intend any such thing, as appears from the last words " and pronounce " on their respective merits."

It has been said many times that a temporal court is not able to decide in any case which religion affords the greater benefit to its adherents. That the judge considered the

question which religion should prevail in the child's life at the moment is, I think, obvious from the whole purport of his decision, and particularly by the reference to the "fine balance." It also appears from the note that he said: "I must take into consideration the express wish of the mother that the child shall not be brought up in the Roman Catholic faith. She took the active step of sending the child with her sister to her own Congregational Church. There is also this circumstance, that the child for two and a half years has been living with his maternal grandparents and has been brought up as one of their family"; and he says that it would be hard to take the child from the home where he had lived for two and a half years.

I am quite satisfied that, in stating those matters, the judge did not exclude from consideration any of the matters which Mr. O'Sullivan has mentioned. The argument was put before him by Mr. Leonard, and I have no doubt whatever that all these points were taken into consideration. But, weighing them all as best he could, the judge came to the conclusion that, in the interests of the child, the right and the best order was that the infant should not be disturbed and taken from where he now is. For the reasons indicated, I cannot think that we should interfere with the exercise of that discretion.

I turn to Mr. O'Sullivan's other point, from which he resiled a little, but which he never abandoned. He put it in the forefront of his argument. Historically, there is, I think, little doubt that in 1871 a father was treated as having a right, which the law was bound to recognize and enforce (unless he had by misconduct of some kind forfeited the right), to dictate the religion of his child. That right to dictate was not lost by death. That appears from *Hawksworth v. Hawksworth* (1). The hardship of the rule, in the view of the judges, is apparent from these observations of Wickens V.-C. (2), "to direct that this ward shall be brought up in the Roman Catholic faith will be to create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly, to inflict severe pain on both mother and child. But it is clear that no argument which would

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(1) L. R. 6 Ch. 539.

(2) Ibid. 540 n.

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“ recognize any right in the widowed mother to bring up her
“ child in a religion different from the father’s can be allowed
“ to weigh with me at all.”

Mellish L.J. said (1): “ It certainly, to me, is very desirable
“ that the rule of law which regulates the religion in which
“ children of early years should be educated should be clearly
“ laid down and enforced.”

I think that there is no doubt that that rule persisted until 1925, though it may be that in the interim there was possibly some change of feeling in regard to it. The social philosophy of the times had altered somewhat, and the result was the passing of the Guardianship of Infants Act, 1925. Section 1 provides that: “ Where in any proceeding before any court
“ the custody or upbringing of an infant is in
“ question, the court, in deciding that question, shall regard
“ the welfare of the infant as the first paramount consideration,
“ and shall not take into consideration whether from any
“ other point of view the claim of the father, or any right at
“ common law possessed by the father, in respect of such
“ custody, upbringing, administration or application is superior
“ to that of the mother, or the claim of the mother is superior
“ to that of the father.”

Mr. O’Sullivan says that that enactment did not affect the pre-existing rule, and, particularly did not mitigate the rule of law to which Mellish L.J. referred. I cannot agree.

✕ In *In re Thain* (2), where a father who had been away on service sought to regain the custody of his own daughter (the mother being dead) from persons who had kindly looked after the child during his absence, the question what right a father had as against foster parents was considered. In that connexion the first part of s. 1 was relevant, that is, the provision that, in deciding a question concerning the custody of a child, the court is to regard the welfare of the infant as the first and paramount consideration. Both Lord Hanworth M.R. and Sargant L.J. said that those words did not alter the law but stated what had been the practice in the Chancery Court. That being so, the court considered that, since the father could provide a home for the child, it was in her best interests that she should go to live with him notwithstanding the inevitable wrench which she would suffer in leaving the home to which she had become used.

(1) L. R. 6 Ch. 544.

(2) [1926] Ch. 676.

In my judgment the point with which we are concerned did not arise in that case and is not touched by the passages in the judgments of this court which Mr. O'Sullivan has read. The section, as I have indicated, first states that the welfare of the infant is the paramount consideration, and then goes on to say that the court shall not take into consideration the question whether any common-law right of the father is superior to that of the mother or vice versa. Mr. O'Sullivan says that that only applies where there is a direct issue between a father and mother, and that in this case that is not so because both father and mother are dead. He therefore asks the court to say that, though the second part of the section may take away the application of the older rule when both a father and mother are living, when the father is dead that rule comes again into full force and effect. That would be a most surprising result, and I think the argument ill founded. I think that, for practical purposes, this is a case where the two religions of father and mother are found to be in conflict, and the conflict must be solved in the same way as if both parents were alive. Consideration must obviously be given, as Mr. Leonard says, to the fact that both parents at one time agreed on the question of religion, and that the child under that agreement was baptized into the Roman Catholic faith, and to the fact that changes in religious upbringing are matters not to be regarded lightly.

The last of the cases, to which Mr. O'Sullivan referred at length, *In re J. M. Carroll* (1), lends no support to the proposition for which he contended. In that case there arose the problem whether the mother of an illegitimate baby girl could recover the custody of her (and bring her up as she wished to, and, in particular, in her own religion) from the society with which she had been lodged, and where she had been brought up in a different religion. The issue, therefore, was between the mother of an illegitimate child (and for practical purposes she is the only parent that such a child has), on the one hand, and an institution on the other. It was in that connexion that Slessor L.J., drew attention to the limitation which may fairly be put upon the words of the second part of s. 1.

The Lord Justice considered historically the position of the father or mother of the child in reference to religion, and went through a number of early cases. The rule had been that

(1) [1931] 1 K. B. 317.

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a parent, particularly a father, where there were two parents, in the ordinary way had the right to require that the child should be brought up in his faith ; and that right was recognized in the terms of s. 4 of the Custody of Children Act, 1891. The Lord Justice said (1) : " This rule is now modified in any " proceedings before the court in consequence of the Guardian-ship of Infants Act, 1925." Then he refers to s. 1 which he paraphrases, and continues : " So that, to-day, as between " father and mother, the court may decide on the basis of the " welfare of the infant which religious education it shall be " given. This statute, however, in my view, has confined " itself to questions as between the rights of father and mother " which I have already outlined," that is to say, with regard to the religion of the child.

That leads back to the question whether the section is to be confined strictly to the case where the issue is between father and mother both living, or whether it extends to the case where the issue is between the views of the father and mother where either, or both, is or are dead. In my view, it is impossible to put that limitation on the intention of the words used by Parliament. It seems to me, therefore, that there is to-day in such a case as this no warrant for the paramountcy of the father's religion for which Mr. O'Sullivan contended.

For these reasons, and after having given the very anxious thought which any case of this sort demands, I am satisfied that there was here no misdirection by the judge. If we were to go further into the matter, it would be impossible for us to interfere with the way in which he exercised his discretion. That being so, I think it in the best interests of all concerned that we deal with this matter on the technical basis of the appeal being out of time, and that we should not further consider it.

ASQUITH L.J. I agree.

JENKINS L.J. I also agree.

Application refused.

Solicitors : S. F. Miller, Mathews & Co., for Thursfield, Messiter & Shirlaw, Wednesbury ; Miller & Smiths.

(1) [1931] 1 K.B. 355.

B. A. B.

In re CHAPLIN, DECED.VAISEY
J.ROYAL BANK OF SCOTLAND AND ANOTHER *v.*
CHAPLIN AND OTHERS.1950
May 11.*Will—Construction—*“All the residue of my personal chattels . . .”—
Whether motor-yacht included—Administration of Estates Act, 1925
(15 Geo. 5, c. 23), s. 55, sub-s. 1 (x).

By cl. 4 of his will, made in 1947, a testator provided : “I make the following specific bequests free of duty :— (a) all my family pictures and portraits, and all my furniture . . . for my wife for life and after her death on trust for my son . . . absolutely (b) all the residue of my personal chattels as defined by the Administration of Estates Act, 1925 to my wife absolutely.”

In 1948, he bought a motor-yacht which he used solely for pleasure. He still possessed it at his death, which occurred on September 12, 1949.

Held, that the motor-yacht was an article of “personal use” within the meaning of s. 55, sub-s. 1 (x) of the Administration of Estates Act, 1925, and that accordingly it passed under the specific bequest of residuary personalty contained in cl. 4 (b) of the will, as being a “personal chattel” within the definition in that paragraph.

In re White [1916] 1 Ch. 172 applied.

ADJOURNED SUMMONS.

The testator, the 2nd Viscount Chaplin, made his will on November 25, 1947. He appointed the plaintiffs, the Royal Bank of Scotland and Owen Johnston Humbert, as his executors and trustees. By cl. 4 of his will he provided : “I make the following specific bequests free of duty :— (a) all my family pictures and portraits, and all my furniture to my trustees to hold the same on trust for my wife for life and after her death on trust for my son . . . absolutely (b) all the residue of my personal chattels as defined by the Administration of Estates Act, 1925 (1) to my wife absolutely.” He directed his trustees to pay the income of his residuary estate to his wife for life, and after her death, to hold both capital and income of that estate on

(1) Administration of Estates Act, 1925, s. 55, sub-s. 1 (x) : “glass, books, pictures, prints, furniture, jewellery, articles of ‘Personal chattels’ mean household or personal use or carriages, horses, stable furniture and effects . . . motor cars and accessories . . . garden effects, domestic animals, plate, plated articles, linen, china, ornament . . . but do not include any chattels used at the death of the intestate for business purposes . . .”

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trusts set forth in the will. The testator died on September 12, 1949, and probate of the will was granted on November 16, 1949.

At his death he owned a 60 foot Viking motor-yacht which he had bought in August, 1948, for 12,500*l.* He had a paid crew, and used the vessel exclusively for pleasure cruises with members of his family.

The question asked by the summons was whether the vessel passed under the specific bequest in cl. 4 (b) of the will.

E. G. Wright, for the plaintiffs, executors and trustees of the will.

Droop, for first defendant, the widow of the testator. The yacht is an article of "personal use" within the definition contained in s. 55, sub-s. 1, (x) of the Act. Article here means "a separate thing forming part of a class" (see the word article in Murray's New Oxford Dictionary). The word "other" is to be implied before the words "articles of household or personal use or ornament" because most, if not all, of the things specifically mentioned in the definition would come within those words if they had not been mentioned, and no class of articles within the words can be defined which would exclude all the things specifically mentioned. Therefore the ejusdem generis principle applies. A motor car has been held to pass under similar words: *In re White* (1). A motor yacht is ejusdem generis with a motor car.

Teague for the remaining defendants, persons interested in the residuary estate of the testator after the death of the widow. The yacht does not fall within the statutory definition of personal chattels. The word "article" is inapt to describe a 60 foot yacht: per Cockburn, C.J. in *Palmer's Shipbuilding and Iron Company v. Chaytor* (2). The phrase "articles of household or personal use or ornament" is inserted to carry a miscellaneous class of items which are not and could not be specifically enumerated, e.g. hairbrushes, spectacles. Therefore the ejusdem generis principle does not apply. Motor cars would not fall within the definition if not specifically mentioned.

VAISEY J. stated the facts and continued: The question is whether the vessel *Mount Robson* is within the definition of "personal chattels" as defined by the Administration of Estates Act, the definition being under head (x) of s. 55, sub-s. 1 of that Act. I need not read the definition in full. [His Lordship read the relevant parts of s. 55, sub-s. 1 (x).] Is this small vessel an

(1) [1916] 1 Ch. 172.

(2) (1869) L. R. 4 Q. B. 209, 212.

article of personal use? That is a curious way of describing it but in such an omuium gatherum it would not be surprising if it were included. The enumeration of specific articles in the definition is neither happy nor clear, but the testator has incorporated the definition in his will, and it seems to me a sufficient description to include the vessel as an article of personal use.

The authorities are not of much assistance. In *Palmer's Shipbuilding and Iron Co. v. Chaytor* (1) Cockburn C.J. in a prosecution under a Factory Act said that "article" could not refer to a ship in a section defining a manufacturing process by reference to the making of any article or part of an article, and therefore he hesitated very much to hold that a boy was employed in a factory merely because he was employed in some department of shipbuilding. But he went on to hold that an iron plate forming part of a ship was an article of metal. That, however, was a case under the criminal law to which different considerations apply. In *In re White* (2) Younger J. (as he then was) held that a motor car did not pass under a gift of "carriages," but passed under a gift of "furniture and all other articles of personal, "domestic, or household use" If a motor car could pass under those words in 1916, I do not see why, in 1950, a small motor-yacht should not pass under the words "articles of "household or personal use." Therefore, although the matter is not as clear as it might be, I shall declare that on the true construction of the will the motor-yacht *Mount Robson* passed under the specific bequest contained in cl 4 (b) of the will of the residue of the testator's personal chattels as defined in Administration of Estates Act, 1925.

Declaration accordingly.

Solicitors: *Taylor & Humbert.*

(1) L. R. 4 Q. B. 209, 212. (2) [1916] 1 Ch. 172.

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✓ WESTON v. HENSHAW.

[1948 W. 1425.]

Settlement—Settled land—Charge on settled land by tenant for life not disclosing settlement—Fraud—Whether charge forgery—Settled Land, Act, 1925 (15 Geo. 5, c. 18), s. 13; s. 18, sub-s. 1 (a), (b); s. 71 sub-s. 1; s. 98, sub-s. 3; s. 110, sub-s. 1; s. 112, sub-s. 2; s. 117, sub-s. 1 (v).

In 1921 a father sold certain property in fee simple to his son who, in 1927, sold it back to him in fee simple. By his will made in 1931 the father settled that and other property on his wife for life and, after her death, that particular property on his son for life with a contingent remainder to a grandson on attaining the age of twenty-five years. In 1931 the father died, and probate of the will was granted to the son and three other sons. In 1940 the widow died, and the four executors of the father's will executed a vesting assent, under the Settled Land Act, 1925, in favour of the son, to whom were handed over all the deeds relating to the property except the probate. In 1944 the son charged the property by way of legal mortgage to secure certain advances, the charge reciting that he was seised in fee simple of it, and the schedule to the charge describing it and stating that it had been conveyed in fee simple to him by a conveyance dated July 29, 1921, subject to the covenants on the part of the grantee and conditions therein contained or referred to. In 1945 and 1946 he further charged it to secure further advances, both charges being endorsed on that of 1944. In 1946 he died. In 1947 what he had done was discovered, and in 1948 the grandson was granted letters of administration to the son's estate. In an action by the grandson for a declaration that the charge and further charges were void as against him, and for delivery up of the charges for cancellation and of the earlier title deeds relating to the property,

Held (1.) that the son, in executing the charge and further charges and suppressing all the transactions to which the property had been subjected since 1921, had committed fraud, but not forgery: *In re Cooper* (1881) 20 Ch. D. 611; *In re de Leeuw* [1922] 2 Ch. 540; and *Reg. v. Ritson* (1869) L. R. 1 C. C. R. 200 distinguished; (2.) that s. 18, sub-s. 1 (a) of the Settled Land Act, 1925, which in effect invalidates transactions not in accordance with the Act, was not in the present case to be read subject to s. 112, sub-s. 2, of the Act and, accordingly, was not subject to the limitation that it should apply only to transactions by, or purporting to be by, a tenant for life as such; (3.) that s. 110, sub-s. 1, of the Act, which protects a person dealing in good faith with a tenant for life or statutory owner, applied only to a person dealing with a tenant for life or statutory owner as such and who knew him to be a limited owner, and that the defendant was therefore not protected by it; (4.) that, by virtue of s. 18, sub-s. 1 (a)

and (b) of the Act, the charge and instruments of further charge were void as against the plaintiff; (5.) that the court would not order the defendant to deliver up the charge and instruments of further charge for cancellation, since they gave no security as against the property and, as against the executors, were evidence of the advance of money in respect of which the defendant could claim; and (6.) that, for the protection of the plaintiff, there should be endorsed on the charge the declaration that it and the further charges were void as against him.

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ACTION.

The plaintiff, who had become absolutely entitled to certain settled property on the death of the tenant for life, his father, claimed a declaration that a legal charge executed by the tenant for life on the property and two further charges endorsed on it were void as against the plaintiff, and claimed also delivery up of the legal charge for cancellation.

The property, before it was settled, had on July 29, 1921, been conveyed in fee simple to the tenant for life for 300*l.* by his father, to whom, in 1927, the tenant for life had re-conveyed it in fee simple for 500*l.* By his will made in 1931 the father settled the property, subject to a life interest to his wife, on his son, the tenant for life, with remainder to his grandson, the plaintiff, on attaining the age of 25 years. After the widow's death the executors of the settlor's will, of whom the tenant for life was one, executed a vesting assent, pursuant to the Settled Land Act, 1925, in favour of the tenant for life, and handed over to him all the documents relating to the property except the probate. The tenant for life subsequently executed a legal charge in favour of the defendant to this action, and later endorsed on it two further charges, to secure certain advances made to him by the defendant. The charge recited that the tenant for life was seised in fee simple of the property, and stated that it had been conveyed to him in fee simple by the conveyance of July 29, 1921. After the death of the tenant for life, the fact that he had executed the charge and not disclosed the settlement was discovered. The plaintiff obtained letters of administration to the estate of the tenant for life, and, by this action, the writ in which was issued on May 28, 1948, he claimed a declaration that the charge and further charges were void as against himself, delivery up of the charge for cancellation, and delivery up of the earlier title deeds relating to the property.

The facts are more fully stated in the judgment.

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W. J. C. Tonge for the plaintiff. The charge is void by virtue of s. 18, sub-s. 1 (a) of the Settled Land Act, 1925 (1).

(1) Settled Land Act, 1925, s. 18, sub-s. 1: "Where land is the subject of a vesting instrument and the trustees of the settlement have not been discharged under this Act, then—(a) any disposition by the tenant for life or statutory owner of the land, other than a disposition authorised by this Act or any other statute . . . shall be void, except for the purpose of conveying or creating such equitable interests as he has power, in right of his equitable interests and powers under the trust instrument, to convey or create; and (b) if any capital money is payable in respect of a transaction, a conveyance to a purchaser of the land shall only take effect under this Act if the capital money is paid to or by the direction of the trustees of the settlement or into court . . ."

Section 98, sub-s. 3: "The trustees of the settlement shall not be liable in any way on account of any vesting instrument or other documents of title relating to the settled land, other than securities for capital money, being placed in the possession of the tenant for life or statutory owner: Provided that where, if the settlement were not disclosed, it would appear that the tenant for life had a general power of appointment over, or was absolutely and beneficially entitled to the settled land, the trustees of the settlement shall, before they deliver the documents to him, require that notice of the last or only principal vesting instrument be written on one of the documents under which the tenant for life acquired his title, and may,

"if the documents are not in their possession, require such notice to be written as aforesaid, but, in the latter case, they shall not be liable in any way for not requiring the notice to be written."

Section 110, sub-s. 1: "On a sale, exchange, lease, mortgage, charge, or other disposition, a purchaser dealing in good faith with a tenant for life or statutory owner shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life or statutory owner, and to have complied with all the requisitions of this Act."

Section 112, sub-s. 2: "Where any provision in this Act refers to sale, purchase, exchange, mortgaging, charging, leasing, or other disposition or dealing . . . it shall (unless the contrary appears) be construed as extending only to sales, purchases, exchanges, mortgages, charges, leases, dispositions, dealings . . . under this Act."

Section 117, sub-s. 1: "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—(v) 'Disposition' and 'conveyance' include a mortgage, charge by way of legal mortgage, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will . . ."

That provision refers to "any disposition by the tenant for life . . . other than a disposition authorized by this Act." The words "other than disposition authorized by this Act" there bring the sub-section directly within the scope of the words in s. 112, sub-s. 2: "Where any provision in this Act refers to sale . . . or other disposition . . . it shall (unless the contrary appears) be construed as extending only to . . . dispositions . . . under this Act." In s. 18, sub-s. 1 (a) the contrary does appear, for the words "other than a disposition authorized by this Act" are used.

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In *In re Alefounder's Will Trusts* (1) the defendant in 1925 became entitled to settled estates as legal tenant in tail in possession with remainders over, but no overriding trusts or incumbrances, and on January 1, 1926 he became the estate owner, holding the legal fee simple in trust for himself as equitable tenant in tail with remainders over. The court held that, on putting an end to the settlement by barring the entail, he could make a valid "disposition" of the property as absolute legal owner in fee simple, and that he need not first obtain a vesting deed under s. 13; and the court held also that, in view of s. 112, sub-s. 2, s. 13 applied only to dispositions under the Act. That, however, is a decision on s. 13, not on s. 18. In that case, the settlement was at an end, so that the Act did not apply. In the present case, the settlement was still on foot when the charge was given, and the charge was not given for any purpose allowed to the tenant for life by s. 71. It was therefore a transaction of the very type which s. 18 is intended to invalidate, namely "any disposition . . . other than a disposition authorized by this Act . . ."

Further, the charge purported to deal with the property under a title which the tenant for life did not have, and, if it was not forgery, was so close to it as to be non est factum: *In re Cooper* (2); *In re de Leeuw* (3). With regard to forgery, it has been said that the "definition of forgery is . . . that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material

(1) [1927] 1 Ch. 360.

(3) [1922] 2 Ch. 540.

(2) (1881) 20 Ch. D. 611.

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"portion of the deed, is not the date at which the deed was "in fact executed": see *Reg. v. Ritson* per Kelly C.B. (1). On that definition, it is a forgery to execute an instrument which purports to be what it is not, which was what was done here.

The charge has not created, and could not create, any legal estate in the defendant, and the plaintiff is entitled to the relief which he claims.

P. A. Ferns for the defendant. Just as, in *In re Alefounder's Will Trusts* (2), the court held that, by virtue of s. 112, sub-s. 2, s. 13 applied only to dispositions under the Act, so the court ought here to hold that, by virtue of s. 112, sub-s. 2, s. 18 applies only to dispositions under the Act, that is to say, to dispositions by the tenant for life as such. The legal charge in the present case is not a disposition by the tenant for life as such. The tenant for life did not execute it as tenant for life, and, on the very wording of the charge, did not purport to do so. The charge recited that the borrower was seised in fee simple free from incumbrances, and the borrower as beneficial owner charged the property by way of legal mortgage.

Also, s. 98, sub-s. 3 is expressly designed to cover just the kind of position that has arisen in the present case. The trustees could, before handing over the documents of title to the tenant for life, have had endorsed on the conveyance of July 29, 1921, notice of the last or only principal vesting deed. They did not, however, take that step. Further, the defendant, when he took the legal charge, was dealing with the tenant for life in good faith, and so is protected by s. 110, sub-s. 1.

With regard to the contention that the legal charge is a forgery, in both *In re Cooper* (3) and *In re de Leeuw* (4) there was personation, which there was not in the present case. *Reg. v. Ritson* (1) was a very special case. There an alteration was made and a false date given. [He referred to the Personation Act, 1874, s. 1, and to Stephen's Digest of the Criminal Law (8th ed. (1942)), p. 400, note 2, and pp. 430-431.] In the present case, forgery was not committed. A tenant for life dealt with the interest which he had. All that he did not do was to comply with the formalities. He may have obtained money by false pretences; he may even have

(1) (1869) L. R. 1 C. C. R. 200. (3) 20 Ch. D. 611.
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(4) [1922] Ch. 540.

(2) [1927] Ch. 360.

committed misappropriation as a trustee: but he did not commit forgery. He could pass a legal estate, even if it were in fraud of beneficiaries: *Thorndike v. Hunt* (1); *Jones v. Powles* (2); *Young v. Young* (3). The plaintiff has not established his claim to the relief sought, either under the Settled Land Act, 1925, or on the contention that the charge is a forgery.

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DANCKWERTS J. This is one of those unfortunate cases where an obvious fraud has been perpetrated by a person now deceased, with the result that one or other of two innocent persons must be deprived of what each of them naturally thought himself to be entitled to. The case concerns certain property which in fact should have been treated as settled land at the most material date. The fraud was perpetrated by William Henry Weston, the father of the plaintiff, William Everard Weston.

On July 29, 1921, the plaintiff's grandfather conveyed the property to the plaintiff's father in fee simple absolutely for 300*l.*, and on July 11, 1927, the father conveyed the property back to the grandfather for 500*l.*

By his will dated March 20, 1931, the grandfather settled this and other property on trust for his wife, and, after his wife's death, this particular property on the father for life with a contingent remainder to the plaintiff, on attaining the age of 25 years. On May 20, 1931, the grandfather died. On October 6, 1931, probate was granted to his four sons, including the father, the first of the enumerated executors.

On June 27, 1940, the widow died, and on September 2, 1940, the four executors executed a vesting assent under the Settled Land Act, 1925, in favour of the father, the tenant for life, to whom they handed over all the deeds relating to the property except the probate. On July 14, 1944, the tenant for life executed a charge by way of legal mortgage in favour of the defendant to secure 250*l.*; and he subsequently executed further charges on February 28, 1945, for 100*l.* and on August 28, 1946, for a further 100*l.*, making 450*l.* in all advanced by the defendant.

In the charge is a recital that "the borrower"—i.e., the tenant for life—"is seised in fee simple free from incumbrances of the property described in the schedule hereto." The

(1) (1859) 3 De G. & J. 563.

(3) (1867) L. R. 3 Eq. 801.

(2) (1834) 3 Myl. & K. 581.

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second operative paragraph is: "For the consideration
" aforesaid the borrower as beneficial owner hereby charges
" by way of legal mortgage all the property specified in the
" schedule hereto with the payment in accordance with the
" covenant herein contained of the principle money interest
" and other money hereby covenanted to be paid by the
" borrower." The schedule describes the property in detail,
and continues: "which said property was by a con-
" veyance dated July 29, 1921, and made between William
" Weston of the one part and the borrower of the other part
" conveyed unto the borrower in fee simple subject to the
" covenants on the part of the grantee and conditions therein
" contained or referred to."

Of course, both those statements, that the borrower was
seised in fee simple free from incumbrances and that the
property had been conveyed to him by a conveyance of
July 29, 1921, were not untrue: the property had been so
conveyed to him. He was not in fact "beneficial owner";
but, of course, the words "as beneficial owner" are merely
words implying covenants for title and not in themselves
necessary: and the fraud consisting in the suppression of the X
transactions subsequent to July 29, 1921, is a case of fraud by
suppression rather than by actual misrepresentation. The
unfortunate lender may lose his estate or interest—perhaps
not strictly an estate but a legal interest—but he is not guilty
of negligence in any way; and no doubt the deed by which
the property was conveyed to the borrower was produced to
him and nothing else. Nothing on the title shown to him
suggested that the borrower was other than absolute owner,
and he is not to be blamed for anything which he did.

On November 18, 1946, the tenant for life, the villain of the
piece, died, and early in the following year what had happened
was discovered. On January 21, 1948, the plaintiff took
out administration to his estate, and he is, as well as having the
legal estate vested in him at the present time, in equity a
beneficiary, and is entitled to the property if he has not lost
it in the events which have happened.

On May 28, 1948, the writ was issued, the plaintiff claiming
a declaration that the legal charge and instruments of
further charge were void as against him, and delivery up
for cancellation of the legal charge and of the other title deeds
relating to the property in the possession of the defendant.

The defendant admits the facts which I have stated. He contends by his defence that, by virtue of the legal charge and instruments of further charge, a valid and enforceable security was created in his favour; and he counterclaims a declaration that, under and by virtue of the charge and further charges, a valid and enforceable security was created in his favour.

(The question for decision is what, having regard to the law applicable, is the position between the plaintiff and the defendant, and which of them suffers misfortune by reason of the fraud which was perpetrated.) Mr. Tonge, for the plaintiff, has made two points. I shall take the second first, because I do not agree with him on his second point, and I do on his first. The second point was that the charge by way of legal mortgage was a forgery. In support of that he referred to two cases, *In re Cooper* (1) and *In re de Leeuw* (2). In both cases the fraudulent person impersonated someone else. Mr. Tonge contends that, on similar principles, the legal charge executed in the present case was a fraud and a forgery, and that no legal estate could possibly pass. But in the first of those cases, *In re Cooper* (1), the fraudulent guarantor had in fact no interest of any kind whatever; and in the second case he had just a bare interest as one of two executors and nothing more: no interest or right by which he could convey alone.

Mr. Tonge referred also to *Reg. v. Ritson*, which is much more material. In that case William Ritson executed a deed on May 5, 1868, for the benefit of his creditors by which all his property was conveyed to a trustee, so that he parted with his interest for the benefit of his creditors. But on March 12, 1868, he was stated to have executed a lease of the land for 999 years from March 25 in the same year. The lease was executed subsequently to the conveyance of May 5, 1868, but was antedated to March 12, 1868, and under it he leased the property for 999 years. The lease purported to be made before he parted with the freehold of the property, and the question was whether this was a forgery. Mr. Tonge argued that that case applied to the present one, that this document was also a forgery, and that therefore by it no estate whatever was conveyed.

To my mind, the present case is not the same as *Reg. v. Ritson* (3). The most material passage in that case is the following in the judgment of Lush J. (4): "To make a deed appear to

(1) 20 Ch. D. 611.

(2) [1922] 2 Ch. 540.

(3) L. R. 1 C. C. R. 200.

(4) Ibid. 205.

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“be that which it is not, if done with a fraudulent intent to deceive, is a forgery, whether the falsehood consist in the name or in any other matter.” But it is clear, I think, that not every fraudulent statement makes a deed a forgery. In the present case it seems to me that there was fraud but that the deed was not a forgery, and therefore that argument by Mr. Tonge fails.

There is, however, another and, in my view, a more formidable point on the terms of the Settled Land Act, 1925. [His Lordship read s. 18, sub-s. 1 (a) and (b), s. 117, sub-s. 1 (v), and s. 98, sub-s. 3, and continued:] Of course, in the present case, the course indicated in s. 98, sub-s. 3 was not adopted by the trustees—the only effective way in which fraud could have been prevented. They are entitled to select one and one only of the documents. They could have selected the conveyance of July 29, 1921, and made on it some endorsement which would have brought to light the subsequent dealings with the settled land.

[His Lordship read s. 112, sub-s. 2, and continued:] Mr. Tonge contends that, by virtue of s. 18 of the Act, as William Henry Weston was in fact a tenant for life and he disposed of the property by charging it by way of legal mortgage for a purpose which is quite clearly not one of those mentioned as allowable for the purpose of raising money by a tenant for life under s. 71 of the Act, the charge by way of legal mortgage was simply void and it could not create any legal interest in the defendant.

The defendant's answers roughly come to this: first, it is admitted, I think, on both sides, that, as the tenant for life had, in fact, the legal estate in fee simple and purported to convey to the mortgagee a legal interest, apart from the Settled Land Act, under the general rule that the purchaser for value without notice receives the legal estate unassailably, the defendant's charge would have been perfectly good. But of course the attack is made on it by virtue of the provisions of the Settled Land Act, 1925. In answer to that attack Mr. Ferns, for the defendant, relies on s. 112, sub-s. 2, which was applied in *In re Alefounder's Will Trusts* (1) with regard to s. 13 of the Settled Land Act, 1925. The tenant disentailed and conveyed the legal fee simple to the purchaser, and no vesting deed had been executed for the purpose of s. 13 of the Settled Land Act. It was held that the transaction was

(1) [1927] 1 Ch. 360.

perfectly good, first because the settlement had come to an end and therefore the land was no longer settled land for the purposes of that section; and secondly because, by virtue of s. 112, sub-s. 2, the section only applies to dispositions under the Settled Land Act and the disposition in that case was by virtue of the vendor's absolute ownership; therefore the Act was not brought in at all.

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Mr. Ferns relied on that principle to contend that s. 18, sub-s. 1 (a) must be read subject to the provisions of s. 112, sub-s. 2, and therefore subject to the limitation on it that it applies only to a conveyance or disposition made, or purporting to be made, by a tenant for life as such. That argument seemed to me at one time to have some force; but, on the whole, I am satisfied that this is a case where, on the contrary, it would make nonsense of s. 18 to limit it to transactions under the Act, because it is essentially concerned with transactions which are not in pursuance of the Act and which it therefore makes void. Consequently, I am not satisfied that that limitation is to be put on the section.

Other points were taken. Mr. Ferns contended that s. 98, sub-s. 3 indicated that the conclusion which I have come to was not correct with regard to s. 18, because there would be no point in putting in the provisions of s. 98, sub-s. 3 for the protection of trustees of a settlement unless it were assumed that the legal estate would be lost by virtue of their negligence and their failure to provide against risks of ending the title. But the tenant for life would have the legal fee simple vested in him in pursuance of the Act, and therefore I reject Mr. Ferns' contention.

Mr. Ferns contended also that the defendant was protected by s. 110, sub-s. 1 of the Act. I am satisfied, however, that that sub-section applies only to a person who is dealing with the tenant for life or statutory owner as such, whom he knows to be a limited owner, and with regard to whom he might be under a duty. I therefore think that that argument also fails.

I conclude that, by virtue of s. 18, sub-s. 1 (a) and (b), the charge is void, and that, unfortunately, the defendant has lost the protection which he very naturally thought he had. Accordingly I must declare that the charge and further charges are void as against the plaintiff.

I do not think that the relief which Mr. Tonge asked for was quite correct. The instruments confer no security as against

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the property, and I do not think it proper to order the defendant to deliver up the charge for cancellation, because, of course, as against the executors it is evidence of advance of money, and the defendant would have a claim. In my view, however, the plaintiff is entitled to some protection, and therefore I think that the declaration should be endorsed on the legal charge. I declare that the charge and further charges are void by virtue of s. 18, sub-s. 1 (a) and (b) of the Settled Land Act, 1925, and I order the defendant to deliver up the documents of title relating to the land. I will direct that, if the defendant decides to appeal and notice is put in in the appropriate time, the endorsement on the deed need not be proceeded with until the appeal has been disposed of.

Declarations accordingly.

Solicitors: *Taylor, Jelf & Co., for Josiah Hincks & Sons, Leicester; Maude & Tunnicliffe, for Jackson, Barrett & Gass, Stockport.*

K. R. A. H.

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May 23

In re FIELD'S WILL TRUSTS.

PARRY-JONES *v.* HILLMAN.

[1949 F. 1569.]

Will — Construction — Uncertainty — Gift of chattels and money to beneficiary “if he shall occupy my freehold property ‘X.’”

A testatrix by her will (a) devised her freehold house to her nephew W. for life with a gift over to her great-nephew J. if he should survive her and attain twenty-five years; (b) bequeathed certain furniture and chattels on trust to permit W. to have the use of them during his life, and after his death in trust for J. “if he shall attain the age of 25 years and shall occupy” the house in question; (c) bequeathed a fund of 6,000*l.* on trust to pay the income to W. for life and after his death as to both capital and income in trust for J. “if he shall attain the age of 25 years “and shall occupy” the house. There were gifts over in each case. J. survived the testatrix and attained twenty-five years, but predeceased his uncle W., and never “occupied” the house

in any sense. On the hearing of a summons to determine the validity of the limitations contained in the gifts of the chattels and the fund to J,

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Held, that it was impossible to ascertain what, on the true construction of the will, constituted a sufficient occupation; that accordingly the condition as to occupation was in each case void for uncertainty; and that J.'s estate was entitled absolutely to the chattels and the fund.

ADJOURNED SUMMONS.

A testatrix who died in 1935 by cl. 15 of her will devised her freehold house and grounds known as "St. John's," Hazlemere, High Wycombe, to her nephew, William Collett Royle, for life, and after his death to her great-nephew, John Popplewell Royle, if he should survive her and attain the age of 25 years, with gifts over. By cl. 2 she bequeathed to her trustees furniture and domestic chattels upon trust to permit William Collett Royle to have the use and enjoyment of them during his life, and on his death "in trust for John Popplewell Royle if he shall attain the age of 25 years and shall occupy my freehold property 'St. John's'", with gifts over. By cl. 6, "in order to provide a fund for the upkeep of my freehold house 'St. John's'" she bequeathed 6,000*l.* to her trustees on trust to pay the income to William Collett Royle for life and after his death "as to both capital and income thereof in trust for John Popplewell Royle if he shall attain the age of 25 years and shall occupy 'St. John's,'" with gifts over.

William Collett Royle died in 1948, having occupied "St. John's" up to his death. John Popplewell Royle died in 1944, aged 29 years. It was conceded that he had never "occupied" St. John's in any sense. In 1939 he executed a settlement which comprised his interests under the will, the first two defendants being the trustees. It was also conceded that the gift of the freehold vested in the first two defendants. The question for decision was whether on the death of William Collett Royle the gifts to John Popplewell Royle of the chattels under cl. 2 and of the fund under cl. 6 failed by reason that the condition of occupation had not been complied with, or whether they took effect on the ground that the condition was void for uncertainty.

Wilfrid Hunt for the plaintiff trustees.

Humphrey King for the first two defendants. The condition is void for uncertainty. It is impossible to say when or how

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the house is to be occupied, or what constitutes occupation. [He referred to *Fillingham v. Bromley* (1) and Jarman on Wills, vol. II, pp. 1518-9.]

E. Blanshard Stamp for the third defendant (contingently interested under the gifts over). The construction of the condition occasions no real difficulty. The terms of the will show that the chattels and the fund are intended to be enjoyed with the house by a beneficiary actually in rateable occupation. There are no such difficulties here as those which arise when "reside" has to be construed. *Fillingham v. Bromley* (1) is distinguishable, and a condition of defeasance was in question there, which the court always holds must be strictly defined.

Maurice Berkeley for the fourth defendant (a residuary legatee). "Occupy" is a much more certain word than "reside," and was held not to be void in *Maclaren v. Stainton* (2); see also *Martin Estates Co., Ltd. v. Watt & Hunt* (3). A condition as to residence was held good in *In re Coxen* (4). If an expression has a reasonably definite meaning, the fact that there may be cases in which it is difficult to say whether or not it has been fulfilled does not make it too vague.

Here, the context of the will requires a substantial occupation by the beneficiary, or his servants and agents, and not by a tenant. He has been given the house, with chattels to furnish it and a fund to maintain it: a mere temporary occupation will not satisfy the terms of the gift.

King in reply. *In re Coxen* (4) is no authority in this case. There the condition of defeasance was that the trustees must be satisfied that the beneficiary had ceased to reside, a matter which the court could easily ascertain.

HARMAN J. [after stating the facts]. The chattels which are to go with "Saint John's" and the fund are both left on like limitations. There is no doubt that John Popplewell Royle satisfied the first, because he attained the age of 25 years; but there is also no doubt that he never was, in any sense of the word, in occupation of the property. Therefore, if the condition as to occupation be good, he has failed to satisfy it and the property will go over; but it is said that the condition is a condition subsequent, and too uncertain, and therefore void. It is said, on the other hand, that there is no doubt here on the facts that John Popplewell Royle did not

(1) (1823) T. & R. 530.

(3) [1925] N. I. 79.

(2) (1858) 27 L. J. (Ch.) 442.

(4) [1948] Ch. 747.

occupy this property, and that therefore it is unnecessary to look further ; because, when there has been no occupation, it is immaterial that a different set of facts might have given rise to doubts and difficulties in deciding whether on the true construction of the will there had or had not been occupation. It is further said that "occupation" means either rateable occupation or some kind of personal occupation by keeping the house furnished and occupied by agents or servants, and not let.

In this connexion reference was made to *Maclaren v. Stainton* (1), and to *Martin Estates Co. Ltd. v. Watt & Hunt* (2); but as the latter concerned the Rent Restriction Acts, I do not think that it is in point. I was also referred to the recent case of *In re Coxen* (3). The decision in that case depended on a condition that there should be a defeasance of a woman's estate if, in the opinion of the trustees, she had ceased to "reside"; and Jenkins J., had no difficulty in holding that such a condition was certain enough, because the court could tell what the opinion of the trustees was. It was not the court's opinion, but theirs, which mattered. Therefore that case does not trouble me, though certain observations of the learned judge might give rise to difficulty. He cited also the following observations of Tomlin J. in *In re Wilkinson* (4). "The fact that the language of the will is not uncertain has, of course, no necessary bearing upon the question whether when particular events have happened there may not be some difficulty in saying whether or not they fall within that which is contemplated by the will; but that is not a matter with which I have anything to do."

Is this, therefore, a case in which I can say that the event is certain enough; and that, accordingly, I am not concerned with the question whether, had the events been different, it might have been difficult to decide whether they amounted to occupation or not? In my judgment, that is not this case. I think that it is the event required by the will which is uncertain. What is meant, it may be asked, by the words, "and shall occupy my freehold property"? Must it be a rateable occupation, must it be an occupation as a freeholder, as a lessee, as a weekly tenant, as a tenant at will, or as a sojourner overnight?

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(1) 27 L. J. (Ch.) 442.

(3) [1948] Ch. 747.

(2) [1925] N. I. 79.

(4) [1926] Ch. 842, 849.

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Mr. Berkeley says that there must be occupation for a substantial period. There, as it seems to me, he points to the defect in his own case. What is "substantial"? This seems to raise the same difficulty as in *Sifton v. Sifton* (1), where their Lordships observed that the testator undoubtedly intended that his daughter should reside for a substantial portion of each year in Canada, but had omitted to say how much he meant by "substantial." Here I feel that, this not being a condition that the estate shall last so long as the occupation lasts, but one under which, once there is occupation, the condition is satisfied and the chattels and the money belong absolutely to the person who is to fulfil the condition, there must be a certainty *ab initio* as to what he must do in order to fulfil it. I am quite unable to say what, on the true construction of this will, would have been a sufficient occupation to entitle John Popplewell Royle to call upon the trustees to hand over the fund to him. That being so, and the condition being a condition subsequent, my view is that it is void, and that, as he attained 25 years, he became entitled both to the chattels and to the maintenance fund.

Order accordingly.

Solicitors : *Preston, Lane-Claypon and O'Kelly for Reynolds, Parry-Jones and Crawford, High Wycombe ; Barnes and Butler, for Hillman and Sons, Seaford ; Warren, Murton & Co., for Newman and Bond, Barnsley ; Field, Roscoe & Co., for Hallett & Co., Ashford, Kent.*

(1) [1938] A. C. 656.

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In re JOHNSTON'S APPLICATION.

1950

Feb. 3, 21.

War damage—Lease—Option to purchase freehold reversion—Whether value of option included in apportionment of value payment—War Damage Act, 1943 (6 & 7 Geo. 6, c. 21), s. 12, sub-ss. 2, 3 ; s. 123.

By s. 123 of the War Damage Act, 1943, "proprietary interest" means the fee simple or "any tenancy . . . thereof other than "a short tenancy."

By s. 12, sub-s. 3 (b), valuation of a proprietary interest in property after war damage has to take place on the assumption that that interest has "the like incidents as the proprietary interest in question had at the material time," that is, March, 1939.

An incident of a proprietary interest within the meaning of s. 12, sub-s. 3 (b), is any factor connected with the proprietary interest which immediately before the war damage would have affected its value in the market.

Where, therefore, a lease contained an option to purchase the freehold reversion during the currency of the lease, but the option was never in fact exercised, and an apportionment had to be made between freeholder and lessee of the value payment in respect of war damage suffered by the property—

Held, that the value of the option was to be taken into consideration in making the apportionment, as being an incident of the lease.

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CASE STATED for the opinion of the court under para. 11 of the schedule to the War Damage (Valuation Appeals) Act, 1945, and R. S. C., Or. 55C, rr. 2 and 3.

On March 22, 1941, property situated in Church Street, Plymouth, consisting of an office, shop, store and a warehouse with a yard suffered war damage by which it became a total loss for the purpose of the War Damage Act, 1943. This kind of property was defined in s. 5 of the Act as a developed hereditament. The value payment was determined at 2,380*l.* At the material date, March 22, 1941, the property was held under a lease dated January 1, 1936, granted to the tenant, George Stanley Showbrook, by the freeholders, William Robert Johnston and Jack Bruce Johnston, for a term of eight years from December 25, 1935, at an annual rent of 130*l.* for the first year and 156*l.* for the remainder of the term. The lease contained an option, exercisable in writing during the currency of the term, to purchase the freehold reversion in fee simple for 2,750*l.* The option was never exercised. The tenant served no notice of disclaimer or retention under the Landlord and Tenant (War Damage) Act, 1939, and the Landlord and Tenant (War Damage) Amendment Act, 1941, in respect of the property. The lease came to an end on December 25, 1943, and the site reverted to the freeholders, who were unable to agree with the tenant what were their respective proprietary interests for the purpose of apportioning the value payment under the War Damage Act.

The matter was referred to a tribunal under the War Damage (Valuation Appeals) Act, 1945. The tribunal decided that the

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option to purchase the reversion contained in the lease was an incident of the proprietary interests in the premises at the material time, and that its value should therefore be taken into consideration in the apportionment of the value payment. One freeholder having died in 1945, the survivor appealed to the court by way of case stated. He died in 1949, and the appeal was continued by the executors of his will.

The question for the determination of the court was whether the option in the lease was an incident which "the proprietary interest in question had at the material time" within the meaning of s. 12, sub-s. 3 (b), of the War Damage Act, 1943, (1).

(1) War Damage Act, 1943, s. 12, sub-s. 1: "The right to receive a value payment shall vest in accordance with the following provisions of this section."

Sub-section 2: "The time by reference to which the vesting of the right to receive a value payment is to be regulated (in this Act referred to in relation to such a payment as 'the material time') shall, subject to the provisions of the two next succeeding sections and of subsection (5) of s. 20 of this Act, be the time immediately before the occurrence of the war damage, and—

"(b) . . . the payment shall be apportioned between the several proprietary interests subsisting in the hereditament or in any part thereof at the material time which were depreciated in value by reason of the war damage in shares proportionate to the extent to which they were respectively so depreciated, and a right to receive the share of the payment apportioned to each of those proprietary interests and a like share of the interest on the payment shall vest in the person who was at the material time the owner of that proprietary interest, subject as aforesaid."

Sub-section 3: "For the purposes of this Act, a proprietary interest shall be taken to be depreciated by war damage if, and to the extent to which, the latter of the two following amounts is less than the former, that is to say—

"(a) the amount that an interest similar to that proprietary interest subsisting in the hereditament on the thirty-first day of March, nineteen hundred and thirty-nine, might have been expected to realize on a sale thereof in the open market made on that day if the hereditament had been on that day in the state in which it was immediately before the occurrence of the damage, and

"(b) the amount that such an interest so subsisting might have been expected to realize on such a sale if the hereditament had been on that day in the state by reference to which, as regards its state after damage, the depreciation in the value of the hereditament is determined for the purpose of computing the amount of the value payment, on the assumption, in each case, that that interest had been subsisting on that date with the like incidents as the proprietary interest in question had at the material time, subject

C. R. D. Richmond for the freeholders. The option should not be treated as having any value in arriving at the apportionment figures. It is clearly not a "proprietary interest" as defined by s. 123. The tribunal have held that the option is an "incident" of the proprietary interest in question (that is, of the lease) within the meaning of s. 12, sub-s. 3 (b). An option is not an equitable interest until it is exercised and the money paid; and until the option is exercised there is no right to have the legal estate. As the option is not a proprietary interest, the question arises whether it is an "incident" attached to a proprietary interest. The word "incident" in s. 12, sub-s. 3 (b) must be construed strictly: it means something which runs with the reversion and binds the reversioner, no matter into whose hands the property might come. Therefore if the option is an "incident" attached to the lease, it must run with the land so as to bind the reversion: *Woodall v. Clifton* (1). There is also the question whether the option may not infringe the rule against perpetuities, and the only remedy for any breach would be damages for breach of contract: *L. & S.W. Railway Company v. Gomm* (2). It is impossible therefore to value such an interest.

The option is not one of the terms of the lease: it is collateral to it; it has nothing to do with the relationship of landlord and tenant: *In re Leeds and Batley Breweries, Ltd. etc.* (3). It might have been granted to the lessee by an independent deed; it might have been granted to a stranger to the lease; or it might have existed without there being any lease at all. In none of those cases would the owner of the option have been entitled to a share of a value payment, because it could not possibly have been described as an incident attached to the lease; nor was the option itself a proprietary interest.

"so far as relevant, to the provisions of para. 3 of the Second Schedule to this Act relating to the operation of the Landlord and Tenant (War Damage) Acts, 1939 and 1941, and other matters."

Section 123: "'Proprietary interest' means, in relation to any hereditament or property

"—(a) the fee simple in the land comprised therein or in any part of that land; and (b) any tenancy of that land or of any part thereof, other than a short tenancy"

(1) [1905] 2 Ch. 257, 279.

(2) (1881) 20 Ch. D. 562.

(3) [1920] 2 Ch. 548.

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If the legislature had intended an option to come within the scheme of the Act, it would have contained a provision to that effect. Where it is intended that the owner of a proprietary interest should share a value payment with some other person, such as a mortgagee or the owner of a rent-charge, the Act makes specific provision for the protection of those interests : see ss. 24, 25, 27, 29 and 30. The rights of a purchaser under a contract pending at the time of the war damage are thus protected : s. 30. This shows that, if it were not for s. 30, a purchaser under a contract would not be entitled to any share of a value payment, notwithstanding the fact that an equitable interest had passed under the contract. The omission of any provisions relating to an option is obviously deliberate.

Charles Russell K.C. and *Granville Slack* for the tenant. The option is an equitable interest : it was an integral part of the lease and went with it : see *In re Adams and the Kensington Vestry* (1) [*Batchelor v. Murphy* (2) also referred to.] The principle was accepted in the argument in *Wright v. Dean* (3). It is necessary to find out how the value of the tenant's proprietary interest has depreciated by reason of the war damage, that is, what was the value of the lease in the open market before the damage occurred, and what was its value afterwards. Everything must be considered that tends to affect the value of the property. The existence of the option must have affected its value. After the damage the tenant would have got nothing for the option ; that is why the depreciation is so sharp. That is the proper test of whether the option should be included ; not whether it runs with the reversion. The option does run with the tenancy, for an assignment of the tenancy would carry the option with it.

It is not suggested that a bare option could have entitled the tenant to any compensation ; but here the option is connected with the lease. The suggestion that an " incident " of the proprietary interest in s. 12, sub-s. 3 means something which runs with the reversion and is binding on the reversioner is not justified. The word " incident " should not be construed strictly ; for the purpose of this Act, an " incident " of the proprietary interest means any factor which affects the value of that interest. It is an excellent description of the option, which is in fact an incident of the lease, that is of the

(1) (1883) 24 Ch. D. 199, 206.

(3) [1948] Ch. 686, 690.

(2) [1925] Ch. 220.

proprietary interest in question. Apart from s. 12, the word "incident" occurs frequently in the valuation provisions, where it could not have the strict meaning for which the freeholders contend: see sch. II, para. 3.

Richmount, in reply, referred to *Hutton v. Watling* (1).

Cur. adv. vult.

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Feb. 21. HARMAN J., read the following judgment, in which, after stating the facts, he continued:

It is clear from s. 10 of the Act of 1943 that the relevant unit for the purposes of awarding the value payment was the developed hereditament as a whole, that is to say, the entire subject-matter of the demise. It was this alone with which the War Damage Commission was concerned, and in respect of damage to which the sum which I have mentioned has been paid without regard to the interests subsisting in the hereditament. Those interests are in the Act styled proprietary interests, of which, having regard to s. 123, there may be two, namely, the fee simple and the lease, this being a tenancy other than a short tenancy within the meaning of that section. It is, further, clear enough that under s. 12, sub-s. 2 (b) of the Act the war damage payment is to be apportioned between these two proprietary interests; and the difference which has arisen concerns the method of apportionment, and is, in short, whether the option should be taken into account as the tribunal has decided, or whether, as the appellant freeholders contend, it should be disregarded. The difference to the contending parties is considerable.

The answer to this question, which I have not found an easy one to resolve, depends on the construction of the War Damage Act of 1943, which was a consolidating Act, its main predecessor being the War Damage Act, 1941, described in its title as "An Act to make provision with respect to war damage to immovable property and to goods."

Immediately before the material date there were two interests in this immovable property, one the reversion subject to the option, and the other the leasehold with the benefit of the option. Either or both of these interests could be sold in the open market, and there can be no doubt that the existence of the option, which was at a favourable price, must have been an element which decreased the freeholders', but increased the

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leaseholder's, interest. When the war damage occurred the freeholders suffered damage to their reversion; but in effect they got rid of the option, for it ceased to be favourable to the lessee, who, on the other hand, lost everything, for the two remaining years of the lease were valueless, or worse, having regard to the destruction of the buildings, while the option ceased to be worth exercising. On general principles, therefore, one would expect each party to be compensated according to what he had lost, and this would necessarily involve taking the option into account, even though it might be obvious that it would never be exercised once the damage had occurred.

I therefore turn to the Act to see whether it has the operation which I should expect. I start with this, that the option is not itself a proprietary interest within the definition clause (s. 123). Apportionment is regulated by s. 12, sub-s. 2 (b). [His Lordship read the sub-section and continued:]

For the purpose of measuring the depreciation caused by the war damage the relevant section is s. 12, sub-s. 3. and it is, I think, agreed that the option, if it is to be taken into account, must come in as being, in the inelegant language of the sub-section, an incident which the leasehold interest "had at the material time"; and, accordingly, the question stated in the case is in these terms: "whether the option to purchase the reversion in fee simple contained in the said lease dated January 1, 1936, is an incident which the proprietary interest had at the material time?"

What, then, is the meaning of the word "incident" as used in the Act of 1943? Apart from s. 12, it is to be found many times in the valuation provisions in sch. II to the Act, where the cross-heading to para. 3 is: "Valuation of proprietary interests: incidents under Landlord and Tenant (War Damage) Acts, etc." In para. 3 (1), there is again the expression "the like incidents as a proprietary interest therein had": in para. 3 (2) and (4) are mentioned "incidents arising" under certain Acts; and in the latter "incidents so arising which in fact attach to the interest." In sub-para. 5 certain "incidents" are to be disregarded, and here the word apparently refers to certain facts about the hereditament, as, for instance, that it is or is not subject to a mortgage or a rentcharge or to restrictions under certain enactments or to a liability to become so subject. This is loose language, and it is urged upon me by counsel for the tenant that the word is not used in any strict sense and that

any fact affecting the value of a proprietary interest is, for the purposes of this Act, described as an incident of that interest. This, he says, is an excellent description of the option here, the existence of the option being a fact constituting an incident which each proprietary interest had.

Counsel for the freeholders, on the other hand, argued that the word should be more strictly interpreted. He submitted that an option contained in a lease to purchase the freehold reversion expectant on the term is no part of the lease, but is a collateral bargain independent of it. Such an option might have been granted to a lessee by an independent deed, or to a stranger to the lease; or there might exist an option without any lease at all. In none of these cases could it be described as an incident which the lease had; nor could it have ranked for a share of the value payment, because it is not itself a proprietary interest.

In support of these propositions I was referred to authority, and in particular to *Woodall v. Clifton* (1). In that case the assign of a lease for a term of ninety-nine years sought to enforce against the assign of the lessor an option to purchase the fee simple contained in the lease, and it was clear, that unless the burden of the option were so annexed to the reversion as to run with the land it would not bind the assigns of the reversion, and would also be void as infringing the rule against perpetuities. The Court of Appeal decided the case upon the footing that the liability to perform the covenant did not run with the land.

Romer L.J., delivering the judgment of the court said this (2): "The question in the present case is whether the statute was intended to cover, or can be construed as covering, such a covenant or proviso as we have now to consider, so as to make the liability to perform it run with the reversion. We have come to the conclusion that that question must be answered in the negative. The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the

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(1) [1905] 2 Ch. 257.

(2) *Ibid* 279.

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“continuance of the term, like a covenant to renew, which
“has been held to run with the reversion, though the
“fact that a covenant to renew should be held to run with the
“land has by many been considered as an anomaly, which
“it is too late now to question, though it is difficult to justify.
“An option to purchase is not a provision for the shortening
“of the term of the lease, like a notice to determine or a power
“of re-entry, though the result of the option, if exercised,
“would or might be to destroy the tenancy. It is, to our
“minds, concerned with something wholly outside the relation
“of landlord and tenant with which the statute of Henry VIII
“was dealing.”

To the like effect is *In re Leeds and Batley Breweries Ltd. etc.*
(1), of which I need only read the headnote, which is as follows :
“An option contained in a lease to purchase the reversion
“and so destroy the tenancy is not one of the terms of the
“tenancy. It is a provision outside of the terms which
“regulate the relations between the landlord as landlord and
“the tenant as tenant, and is not one of the terms of the
“original tenancy which will be incorporated into the terms
“of the yearly tenancy created by the tenant holding over
“after the expiration of the lease.”

My attention was also drawn to certain further sections of the War Damage Act, 1943, with a view to showing that where the legislature intended the owner of a proprietary interest to be bound to share the value payment with or pay it to some other person, special provisions are found for that purpose : thus s. 24 gives rights over the value payment to a mortgagee, while s. 25 similarly protects the interest of an owner of a rent-charge. Section 27 concerns settled land ; s. 29 gives rights to a devisee under a will ; and s. 30 rights to a purchaser under a contract pending at the time of the damage. This last was particularly relied upon on the ground that, if it were necessary to make special provision that the vendor under a pending contract should hold the value payment in trust for the purchaser, this must imply that, even where the equitable interest has passed by virtue of the contract, the vendor as estate owner of the proprietary interest in the freehold is, or might but for the section, be entitled to retain the value payment.

It was said to follow that, as, under an option not exercised, no contract exists and no equitable interest has passed, the grantor of the option having the legal estate and the equitable

interest ought not to forfeit any part of the value payment to the grantee of the option, there being no equity in the grantor to pass any of it to him. This, of course, is true where there is an option unconnected with a lease; but it does not solve the problem where the option and the lease are coupled together so that, as here, the assign of the lease could have exercised the option without any express assignment to him of the benefit of it: see *Batchelor v. Murphy* (1).

In that case, Pollock M.R., speaking of an option to purchase the freehold reversion on a lease, said, after referring to *In re Leeds & Batley Breweries, Ltd., etc.* (2), "that an option to purchase the reversion and so destroy the tenancy is not really one of the terms of the tenancy. It is a provision which is outside the terms which regulate the relations between landlord as landlord and tenant as tenant. It is in truth and in fact a collateral bargain. It is not one of the terms of the demise. It is incidental but collateral to the demise. In the present case—and this I think is the only outside matter which has any weight upon my mind—there is this. It is quite clear that if the Murphys had taken by assignment of the original lease of October 17, 1913, they would have acquired this option. It would have passed to them under an assignment." (3)

Sargant L.J., in the same case said (4): "Now it is to be noticed that if there had been a mere assignment by Clarkson to the Murphys, the necessary result would have been that the Murphys would have been entitled to the option of purchase given to Clarkson by the lease to him . . ."

Finally, it was submitted that an incident must be something affecting the legal estate in the freehold, because otherwise the sections just mentioned would have been unnecessary, as the word "incident" would have sufficiently protected the rights of the persons mentioned. I feel the force of these arguments; but on the whole it is not in my judgment enough to outweigh what I should have considered the natural meaning of the section, which must, I think, have been intended to apportion the compensation in proportion to the loss suffered. I have therefore come to the conclusion that the tribunal was right, and that this option was an incident which the proprietary interests had at the material date; or, in other words, that, on the true construction of s. 12, sub-s. 3 of the Act of

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(1) [1925] Ch. 220, 226.

(3) [1925] Ch. 226.

(2) [1920] 2 Ch. 548.

(4) *Ibid.* 231.

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1943, an incident must be taken to mean any factor connected with the proprietary interests which immediately before the war damage would have affected the value of each of them in the market.

I therefore propose to answer the question in the case by declaring that the option to purchase the reversion in fee simple contained in the lease is an incident which the proprietary interest had at the material time.

There is no difficulty here about the figure, which have all been agreed on either of the hypotheses as set out in the case stated.

Declaration accordingly.

Solicitors : *Wedlake, Letts & Birds, for Gidley, Wilcocks & Maddock, Plymouth ; Gregory, Rowcliffe & Co., for Bond, Pearce, Elliott and Knape, Plymouth.*

I. G. R. M.

VAISEY
J.

SUNNUCKS v. SMITH

[1948 S. 624.]

1950

Feb. 16.

Taxation—Costs—Fee on brief in court of first instance—Same fee on brief in Court of Appeal—Reduction by taxing master of fee on brief in Court of Appeal—Discretion.

The statement in *Sturgis v. Morse* (No. 2) (1859) 26 Beav. 562, that counsel is entitled to the same fee in the Court of Appeal as was on the brief in the court of first instance, is not of universal application : it is no more than a prima facie rule to which there may be many exceptions. If the taxing master finds valid grounds for regarding the work in the Court of Appeal as of less value than that in the court of first instance, it is open to him and within his discretion to proceed accordingly.

SUMMONSES to review taxation under an order made in the Chancery Division and an order, on appeal, by the Court of Appeal.

On March 22, 1949, an order was made that an action should be dismissed, with costs to be taxed by the taxing master and

paid by the plaintiff to the defendant. On July 29, the taxation took place before Master Gibbon and afterwards the plaintiff lodged objections. On October 21, Master Gibbon considered the objections and decided to re-open the taxation. On October 8, the appeal against the judgment in the court below dismissing the action was heard and dismissed, with costs to the defendant. On November 11 the further taxation of the costs of the hearing in the court below took place, and certain sums were taxed off the charges and disbursements. On December 6, the plaintiff carried in her objections. These were, among other things, to a sum of 26*l.* 5*s.* *od.*, which had already been reduced to 8*l.* 8*s.* *od.*, and a sum of 32*l.* 10*s.* *od.* for counsel for the defendant and counsel's clerk on the hearing. On December 20 the taxing master considered the costs of the appeal. He reduced the fee of counsel for the defendant and counsel's clerk on the hearing in the Court of Appeal from 32*l.* 10*s.* *od.* to 21*l.* 15*s.* *od.*, giving as his reason that counsel was fully conversant with all the facts and so was put to very little extra trouble. He also specially noted that, in the brief, instructing solicitors had expressed the view that the appeal was bound to fail.

On January 3, 1950, the defendant lodged objections to the reduction of the fee on the brief in the Court of Appeal for counsel and counsel's clerk from 32*l.* 10*s.* *od.* to 21*l.* 15*s.* *od.* His reasons were that it was a custom of long standing to give counsel at least the same fee in the Court of Appeal as in the court below; that, as the plaintiff was appearing in person and was not fully conversant with court procedure, counsel had to be prepared to meet any new points that might arise; that the decision appealed from concerned matters affecting the personal integrity of the defendant, who was a solicitor; that counsel had again had carefully to consider all the papers and correspondence, some of which the plaintiff alleged not to have been produced in connexion with the hearing in the court below; and that on the taxation the taxing master was greatly influenced by the fact that instructing solicitors had expressed the opinion that the appeal was bound to fail. The defendant contended that mere optimism of an instructing solicitor did not affect the work or lighten the responsibility of counsel, and he considered that the fee paid to counsel was fully justified by the work involved.

On January 9 the plaintiff took out a summons asking for a review of the taxation of costs in the court below so far as

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concerned the sums of 26*l.* 5*s.* 0*d.* and 32*l.* 10*s.* 0*d.* On January 13 the taxing master heard the defendant's objections to the reduction of the fee on the brief in the Court of Appeal, and considered it proper that a pro forma summons should be issued asking the judge to review that taxation and to give a decision on it immediately after the hearing of the plaintiff's summons for review of taxation of costs in the court below. On January 16 Master Mosse heard the plaintiff's summons of January 9 and adjourned it to the judge. On January 17 the defendant took out a pro forma summons as directed by the taxing master ; and on January 23 the pro forma summons was heard by Master Mosse, who adjourned it to the judge and arranged for the plaintiff's summons and the pro forma summons to come on together, which they did on February 16.

The plaintiff in person. The reduction of the 26*l.* 5*s.* 0*d.* by 17*l.* 17*s.* 0*d.* to 8*l.* 8*s.* 0*d.* is not enough. Some of the items of which the 8*l.* 8*s.* 0*d.* consists are expenses that need not have been incurred. As to counsel's fee in the Court of Appeal, it is far too high. Counsel has not earned it by the work which he did in that court, and it ought not to be paid to him.

W. F. Waite for the defendant. It is usual for the fee allowed to counsel in the Court of Appeal to be the same as that which was allowed to him in the court below : see *King's Costs on the High Court Scale*, p. 112 ; *Parkinson v. Hanbury* (1) ; *Wegmann v. Corcoran, Witt and Co.* (2). It makes no difference if the case comes on in the Court of Appeal quickly so that counsel still remembers the whole matter: the fee will still be the same in the Court of Appeal as in the court below : see *Sturgis v. Morse* (No. 2) (3) ; and, if the case deserved a heavy fee, it may be even larger than in the court below : see *Edgington v. Fitzmaurice* (4). In the present case, the original fee in the Court of Appeal should be restored.

VAISEY J. The item of 26*l.* 5*s.* 0*d.* to which the plaintiff objects has already been reduced by no less than 17*l.* 17*s.* 0*d.*, an operation which I should have thought gave some colour to her successful advocacy before the taxing master. I think that both that item and counsel's fee in the court below are matters of quantum in the discretion of the taxing master,

(1) (1865) 12 L. T. 624.

(2) (1880) 41 L. T. 792.

(3) (1859) 26 Beav. 562.

(4) (1885) 33 W. R. 911, 913.

and I am not persuaded that the taxing master has acted on any wrong basis. I dismiss the plaintiff's summons with costs.

The defendant, on his summons, contends that the reduction of the fee in the Court of Appeal from 32*l.* 10*s.* 0*d.* to 21*l.* 15*s.* 0*d.* is wrongful because of the principle laid down in *Sturgis v. Morse* (No. 2) (1), which undoubtedly does lay down that *prima facie* counsel is entitled to the same fee in the Court of Appeal as in the court below. From the report in the English Reports it appears that the taxing master disallowed 44*l.* out of a fee of 100*l.* to leading counsel and 23*l.* out of a fee of 77*l.* to junior counsel, although the larger sums of 177*l.* were the fees allowed by the master on the original hearing.

The taxing master there stated the grounds and reasons for his decision at length. He said (2): "Firstly. Because the fees
" to counsel on the original hearing were given in respect of
" the whole case, as it then stood, between the plaintiff and
" the whole of the defendants, and as the appeal was the appeal
" of one defendant only, whose interest was separate and
" distinct from all the rest, and the other defendants could
" not be heard except to support the decree, I arrived at the
" conclusion, after having carefully looked through the briefs,
" that the answers of all the other defendants (except that of
" the defendant Ling, which was read by order as an affidavit),
" and the evidence and exhibits used on the part of those
" defendants were not necessary for the plaintiff's counsel on
" the hearing of the defendant Morse's appeal; and such
" answers and evidence, amounting to upwards of two hundred
" sheets, I feel that the objection taken to the amount of the
" fees given was a valid one, and I accordingly reduced those
" fees in proportion to what I considered might and ought to
" have been the briefs given to counsel on the appeal.
" Secondly. I consider the understanding, that there has
" existed a rule, that counsel are entitled to the same fees on
" the argument of an appeal as were given on the original
" hearing, can only have been applicable to a period when
" a year and upwards elapsed between the two hearings, and
" could then only apply to cases where the same briefs were
" necessarily given. Whereas, in the present instance, the
" appeal was heard in the term immediately following that in
" which the decree was pronounced, a circumstance in itself
" in my judgment, a ground for giving less fees than those
" given on the original hearing, as counsel would not have

(1) 26 Beav. 562.

(2) Ibid. 563.

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“ the labour of making themselves masters of the case as in
“ the first instance.”

Sir John Romilly M.R., in his judgment said : (1) “ I think
“ the master has, through misapprehension, come to a wrong
“ conclusion. The master seems to have thought that the
“ fees paid to the plaintiff’s counsel on the original hearing
“ were proper and has allowed them. The principal defendant
“ appealed from the whole decree. I call it the whole decree,
“ because, except a small portion, it was so, and the whole
“ matter was really before the Court of Appeal. The master
“ has disallowed a portion of the fees paid with the briefs
“ on the appeal, on the ground that it was ‘ the appeal of one
“ ‘ defendant only, whose interest was separate and distinct
“ ‘ from all the rest, and that the answers of the other
“ ‘ defendants were not necessary for the plaintiffs’ counsel
“ ‘ on the appeal.’ But I apprehend that evidence given for
“ any defendant is evidence for the whole cause, and that the
“ plaintiff may make use of it both in argument or comment.
“ I have known it done repeatedly, and I think that any
“ evidence in the cause may be made use of by the plaintiffs
“ against the defendants, and by the defendants against the
“ plaintiffs. That being so, I do not see how the master
“ could come to a right conclusion in determining that any
“ part of the evidence was unnecessary without hearing the
“ cause itself.

“ Where there is an appeal from a small portion of a decree,
“ as in respect of parties or as to a trifling matter, I can
“ understand that the fees to counsel may be much less than
“ on the original hearing, and I have no doubt that this would
“ be a matter of quantum quite in the discretion of the taxing
“ master. But as he states the rule to be this, viz., to allow
“ the same fee on an appeal from whole decree as on the
“ original hearing, I do not see how he could decide that
“ a portion of the brief which was necessary on the first hearing
“ was unnecessary on the appeal, without hearing the cause ;
“ nor do I see how the solicitor could take upon himself to
“ decide that any part of the original brief might prudently
“ be omitted from the brief on the appeal. The master, as
“ a second reason, attributes something to the rapidity with
“ which the appeal was brought to a hearing, and thinks that
“ therefore there would be less labour to counsel to master
“ the case. I dissent from that view of the case also, and as

"I disagree with the master, I must either allow the fee to counsel, or direct a review of the taxation."

My difficulty in the present case is that I think that it is going much too far to say that there is a universal rule that the fee in the Court of Appeal should be the same as in the court below. The matter must in each case be examined to see whether there were the same issues and the same necessity to go into them in the Court of Appeal as in the court below. I have not been able so to examine it in this case.

The master's note on the objection to the taxation (the objection being that there is such a rule of uniformity between the briefs in the two courts) is as follows: "In taxing the bill in the appeal, I reduce counsel's fees to 20 guineas on the ground that I consider the work counsel had to do did not merit more. Counsel appeared against Mrs. Sunnucks previously always with success and there was no expectation that she would win in the Court of Appeal". Had the master stopped at the words "did not merit more," I should have had great difficulty in interfering with his discretion; but when he gives as a further reason that counsel appeared against the same defendant on previous occasions, and when goes on further to allege as some ground for his decision that the plaintiff's appeal was apparently hopeless, I find some difficulty in following it.

On the grounds stated by the taxing master, I think that the general rule that the fee should be the same ought to prevail. I have seen no reason whatever for reducing the fee in the court below. This was an action brought against a solicitor and accusing him of conduct prejudicial to his career, and he was entitled to have experienced counsel to look after him. A fee of 30 guineas on the hearing of the action does not seem to be too much. Why should it be less in the Court of Appeal? Had the master said that the issues were greatly limited, or that a much smaller fee would be necessary to cover an argument as compared with the court below, he might have been justified in saying that a lower fee should be allowed; but he did not say that: he said that counsel had previous experience of this particular defendant, that he had always been successful, and that her appeal was hopeless. None of those grounds is in the least relevant. Sometimes it is all the more advisable for counsel, presented with the brief in a case in which his success seems certain, to be particularly careful not to be taken by surprise.

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It seems very difficult indeed, in this particular case and on these particular grounds, to suggest that the fee in the Court of Appeal should be any less than the fee in the court below.

I wish to make it perfectly clear for the master's guidance that, although there is a *prima facie* rule that the fee should be the same in both courts, it is a rule to which there may be many exceptions; and, if the taxing master finds valid grounds for regarding the work as of less value in the Court of Appeal than in the court below, it is open to him and within his discretion to proceed accordingly. In the present case, however, I find no suggestion that the master has applied his mind to the kind of consideration which would have justified a lower fee. No valid ground for departing from the rule has been shown, and I will vary the taxing master's certificate by restoring the higher figure of 32*l.* 10*s.* 0*d.* and cancelling the reduced figure of 21*l.* 15*s.* 0*d.* I hope that I have given the taxing master some guidance. The difference between an absolute rule and a *prima facie* rule subject to occasional exceptions is an important one.

Solicitors : *Griffiths, Smith, Wade & Riley.*

K. R. A. H.

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Apl. 18, 19.

ETON RURAL DISTRICT COUNCIL *v.* THAMES
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[1949 E. 49.]

Land drainage—Catchment board—Statutory duty to commute all defined obligations “imposed on persons . . . in connexion with the main “river”—Meaning—Land Drainage Act, 1930 (20 & 21 Geo. 5, c. 44), s. 9, sub-ss. 1, 3, 5.

By s. 9 of the Land Drainage Act, 1930: “(1.) It shall be the “duty of every catchment board to take steps for the commutation “of all obligations imposed on persons by reason of tenure, “custom, prescription or otherwise, to do any work (whether by “way of repairing of banks, maintaining of watercourses or “otherwise) in connexion with the main river . . . (3.) Any “capital sum or terminable annuity fixed under this section “shall, notwithstanding any agreement to the contrary between

"the owner and any lessee of the land, be payable by the owner . . . (5.) The sum to be paid in respect of the commutation of any such obligation . . . shall be payable by way either of a capital sum or of a terminable annuity . . . and shall be charged on the land in respect of which the obligation existed, and shall have priority over any other incumbrances charged on that land by the owner thereof, whether before or after the passing of this Act"

On the construction of the words "or otherwise" as having a meaning ejusdem generis with the preceding words "tenure, custom, prescription," and on construction of s. 9 as a whole, the obligations to which s. 9, sub-s. 1 refers are obligations imposed on land and do not include purely contractual obligations.

Where, therefore, a rural district council had in 1900 covenanted by deed with the trustees of a will to keep clean and free from obstruction the channel of a specified ditch and of every ditch and watercourse connecting it with the River Thames, so that the land bordering the ditch should not become flooded by the flow of water from a pipe conveying water from certain land vested in the council into the ditch, and, the conservators of the river being a "catchment board," and the ditch forming part of the "main river" for which they were responsible within the meaning of the Land Drainage Act, 1930, the council called on them to take steps to commute the obligation imposed by the covenants,

Held, that, as those obligations were purely contractual, they were not among the obligations which s. 9, on its true construction, required the conservators to commute.

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ACTION.

By a deed dated August 25, 1908, between the plaintiffs, Eton Rural District Council, and the trustees of a will, the council covenanted, among other things, to keep the channel of a specified ditch and of every ditch and watercourse connecting it with the River Thames clean and free from obstruction, so that the land bordering the ditch should not become flooded by reason of the flow of water from a pipe conveying water from certain land vested in the council into the ditch. At the date of the action the benefit of, and right to enforce, the covenant were vested in a company, Harry and Charles Rochford, Limited.

The defendants, the River Thames Conservators, were a "catchment board" within the meaning of the Land Drainage Act, 1930 and the ditch in question formed part of the "main river" within the meaning of that Act for which they were responsible.

The council called upon the conservators to take steps to commute the obligation imposed by the covenant, but they

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refused. By this action the council sought a declaration that, by reason of s. 9 of the Land Drainage Act, 1930, it was the duty of the conservators to take those steps. The conservators denied that it was their duty so to do, either by reason of that section or at all.

Milner Holland K.C. and *G. T. Hesketh* for the council. The Land Drainage Act, 1930, is a consolidating Act. Section 9 of the Act corresponds to s. 15 of the Sewers Act, 1833, in which are the words "by reason of tenure, frontage, prescription, custom, covenant, or grant." The court is not asked, in the present case, to construe the Land Drainage Act, 1930, by reference to the Sewers Act, 1833, but it is asked to take notice of the earlier Act. The onus is on the defendant conservators to show that, in the Land Drainage Act, 1930, the words "or otherwise" would not include all known lawful modes giving rise to the obligations which come within s. 9, sub-s. 1, including entering into a covenant.

As to the ejusdem generis rule, it can, indeed, be contended with great force that the words "or otherwise" in s. 9 require its application, and that it is essential to show similarity in type with one of the three named modes. If the contention for the conservators is that only the modes which bind land apply, then the words "tenure, custom, prescription" have themselves already exhausted the genus. Apart from that list—"tenure, custom, prescription"—there is no other mode of giving rise to a claim, of attaching the obligation specifically to land. A covenant to do repairs of this kind is ejusdem generis with—to take only one of the three—prescription. An obligation to repair a sea wall can arise by prescription: see *Hudson v. Tabor* (1), where Cockburn C.J. quite shortly stated the law as follows (2): "That an owner of land fronting the sea may be bound by prescription to maintain a bank or wall to keep out the sea water for the protection of the owner of the adjoining land, is abundantly shown by the authorities cited in the course of the argument." Again, in *Gale on Easements* (11th ed., p. 452), is the following statement: "The liability *ratione tenuræ* to repair a highway may be established on the ground of a licence presumed to have been granted by the Crown. A similar liability arising *ratione tenuræ* or by prescription is usually established by showing that for a number of years the persons charged and their

(1) (1876) 1 Q. B. D. 225. (2) *Ibid.* 229.

“predecessors have done the repairs.” Thus, if it were found that a person habitually repaired a sea-wall, as in that case, or a ditch, as in the present case, it would be proper to imply a lost covenant. In the present case, the covenant was, of course, not “lost.” It is, however, analogous to prescription, and the conservators’ duty is to commute the council’s obligation under it.

Diplock K.C. and *Ralph Etherton* for the conservators. The covenant in the deed is nothing more than an ordinary contractual agreement to maintain a watercourse. The words “or otherwise,” in their second context in s. 9, sub-s. 1, can without difficulty be read as ejusdem generis with repairing banks and maintaining watercourses.

[VAISEY J. In fact, that kind of work—structural work—is the only kind which the section does allow : it does not allow such work as, for example, the running of a line of steamboats between two or more points on the river.]

The actual terms of the section as a whole are clearly confined to ancient obligations attaching to land, and the words “or otherwise” cannot be of wide general application. The decision in *Hudson v. Tabor* (1) came after that in *Morland v. Cook* (2) and before that in *Austerberry v. Oldham Corporation* (3), and it was still thought that the burden of a positive covenant ran with the land. A grant subject to the burden of repairing a wall was made also in *Lyme Regis Corporation v. Henley* (4).

Milner Holland K.C. and *G. T. Hesketh* in reply. Keeping a ditch clean and free from obstruction is ejusdem generis with repairing banks and maintaining watercourses, the obligation to do which is one of the obligations which it is the duty of the catchment board to commute. It follows that the present case is the very kind of case in which the conservators are intended to commute the obligation, and that the obligation is just the kind which they are intended to take over.

Robert Callis wrote as follows, in his “brief repetition” of his second lecture in *Callis on Sewers* (4th ed.), 1824, p. 326 : “After these I took upon me, by how many several ways the “defences (that is ” as well against the overflowing of the sea “as by the inundation of fresh waters,” see *lectura secunda*, at p. 139) “might be maintained, which were nine in number.” After that sentence there is a bracket, which contains, in a

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(1) 1 Q. B. D. 225.

(3) (1885) 29 Ch. D. 750.

(2) (1868) L. R. 6 Eq. 252.

(4) (1834) 1 Bing. (N. C.) 222.

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column, the following: "1. Frontage. 2. Ownership. 3. Prescription. 4. Custom. 5. Tenure. 6. Covenant. 7. Usus Rei. 8. A township. 9. By the laws of sewers." Thus "tenure, custom, prescription" are quite clearly but three of the ways in which obligations are imposed. As has been already pointed out, the corresponding section of the Sewers Act, 1833, included with those three words "frontage," "covenant" and "grant," and Callis included also usus rei, a township and the laws of sewers. The authorities are in favour of the council, who accordingly, are entitled to the declaration sought.

VAISEY J. If the deed of August 25, 1908, is within s. 9, there is an absolute duty on the conservators to carry out the statutory direction; if not, they are not only under no such duty, but have no power to carry it out. It is an easy way of handling the matter to say that the words "or otherwise," in the first of the two contexts in which they appear in s. 9, sub-s. 1, of the Land Drainage Act, 1930, are of general application and mean exactly what they say: if that be the proper way of construing the section, there is an end of the matter, and the obligation by way of covenant which rests on the council is one which the conservators are bound under the subsection to commute.

Looking, however, for the moment at that sub-section alone, I have to inquire why the words "by reason of tenure, custom, prescription or otherwise" come into the language of the subsection at all, because, if "all obligations" meant all obligations without qualification, the section would, I should have thought, have been framed by reference to all obligations imposed on persons by any means to do such work as is there mentioned: and I think that, as a matter of construction, I am bound to give some weight to the insertion of those words "by reason of tenure, custom, prescription or otherwise," and to give some explanation why they appear in the sub-section.

It seems to me (and I do not think that it can be denied) that the words "or otherwise" in that first context ought, to some extent and in some measure, to be construed according to the ejusdem generis rule. The problem is to decide what significance I ought to attach to those two words in that context. It is, I think, to be observed that the three words "tenure," "custom," "prescription" all seem to indicate an obligation

which attaches to, and exists by reference to, some particular land ; and I am inclined to think that those words exclude by implication merely personal obligations. When the sub-section mentions " obligations imposed on persons by reason " of tenure, custom, prescription or otherwise," I have a strong suspicion that the meaning may well be that the obligations have to be so imposed for those particular reasons or on those particular grounds, and not generally.

It is curious that the same two words " or otherwise " appear twice in this subsection ; and, in the second context in which they appear, it is obvious that the ejusdem generis principle of construction must apply : for, by using the words " whether by way of repairing of banks, maintaining of water-courses or otherwise " as descriptive of work in the main river, the sub-section clearly limits the work to structural works, and excludes other operations such as I suggested during the course of the argument—for example, the running of a line of steamships on the river. The matter, however, does not rest there, because the sub-section is only one of eight in this particular section, to which the marginal note is : " Commutation of obligations to repair by reason of tenure, " &c." Sub-section 2 imposes a consequential duty on the conservators to give notice of proposals to commute any obligation to which the section applies, and I do not think that there is really much relevance in that sub-section, which, however, enables the Minister of Agriculture to decide whether or not a commutation shall be made.

Sub-section 3 is, however, of great importance and should, I think, be read as though sub-s. 2 did not intervene between it and sub-s. 1. Its drafting does not seem to me to be above criticism. What is meant by " the land ? " What is meant by " the owner " ? But the sub-section at least fortifies me in the preliminary view which I took of sub-s. 1, for I find in it reference to an obligation imposed on land as being at any rate the main subject of the section. It corroborates, I think, the impression which I derived from these somewhat strange words " tenure, custom, prescription or otherwise " which appear in sub-s. 1, and, as all three of them are proper to be used in connexion with obligations imposed on land, I think that sub-s. 3 shows that the impression was not without foundation.

In sub-s. 5, again, there is no hint that the sum to be paid in respect of the commutation is not a sum which can be

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charged on some land, for that sub-section directs that the amount "shall be charged on the land in respect of which the "obligation existed," indicating that the draftsman of the whole section contemplated that he was concerned with obligations which were in fact obligations affecting particular land; and both sub-ss. 3 and 5 seem to me quite inappropriate to, and, indeed, inconsistent with, the application of the section to a merely contractual obligation such as that in the agreement of August 25, 1908.

There are other indications in the section which, I think, point the same way, and, indeed, I can find nothing in the other sub-sections which leads to the opposite conclusion—namely, the conclusion that "obligations" in sub-s. 1 means all obligations without qualification. It appears to me that, both in the wording of sub-s. 1 as it stands alone and in the reading of that sub-section in conjunction with the other sub-sections to which I have referred, I am bound to take the view which has been taken by the conservators, namely, that the obligation—a purely contractual obligation under the deed of August 25, 1908—is one which the conservators are under no duty to commute or to take steps to commute. Accordingly, they have no right to commute it, even if they desired to do so.

My attention was drawn to a corresponding section of the Sewers Act, 1833—s. 15—where, in a similar context, instead of the words "by reason of tenure, custom, prescription or "otherwise," we find the words "by reason of tenure, frontage, "prescription, custom, covenant or grant." Although I do not think that one can properly construe the Act of 1930 by reference to the Act of 1833, it is, perhaps, not without significance that, of the words used in the earlier section, only those which in my opinion point to obligations imposed on, or created by reference to and as a burden on, particular land have been selected, and that there is a notable omission of the words "covenant or grant" from s. 9 of the Act of 1930, although they appear in the earlier section.

I agree that s. 9 is obscure, but, on the whole, I think it reasonably clear that (for what reason I do not pause to inquire) it is concerned with obligations referable to, charged on, arising out of, some land; and, although that may or may not have been the intention of the legislature, I can only assume such an intention from the words which I find in the section itself. The section seems to me to point to ancient

obligations attaching to land. "Tenure," "custom," "prescription" are all words appropriate to those ancient incidents of land tenure the origin of very many of which is lost in the obscurity of history. Those three words, "tenure," "custom," "prescription" were not, in my judgment, selected arbitrarily or without intentional significance; and although, had sub-s. 1 stood alone, it would, I think, have been very difficult—I do not say impossible—to limit the generality of the words "or otherwise," I think that the matter is really concluded by the later subsections. The action will be dismissed.

After discussion, his Lordship directed that the action should be dismissed with costs but that, should no notice of appeal be served and the judgment, accordingly, stand without appeal, there should be no order as to costs.

Judgment for the defendants.

Solicitors: *Sharpe, Pritchard & Co., for G. L. Bridger, Slough; G. E. Walker.*

K. R. A. H.

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In re MANDER

WESTMINSTER BANK, LD. *v.* MANDER.

[1950. M. 67]

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May 24, 26.

Will—Charitable bequest—Contingent gift for candidate for priesthood—Perpetuity—Validity.

A testatrix directed her trustees "to invest such sum in trustee securities as would be sufficient to train a candidate for the priesthood until such time as a candidate comes forward from St. Saviour's Church St. Albans."

Held, that the bequest was wholly inoperative, as the event contemplated was a completely uncertain one, which might happen at some future date, unascertained and unascertainable, but which might never happen at all.

In re Lord Stratheden and Campbell [1894] 3 Ch. 265 followed.

ADJOURNED SUMMONS.

By her will, dated December 13, 1945, Violet Elizabeth Mander directed as follows: "In memory of my sister Mary

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“ Emily Mander I wish during my lifetime to pay for the training for the priesthood of a candidate when one comes forward from St. Saviour’s Church St. Alban’s Herts aforesaid but should I die before I have been able to fulfil this wish I direct my trustees to invest such sum in trustee securities as would be sufficient to train a candidate for the priesthood until such time as a candidate comes forward from St. Saviour’s Church St. Alban’s aforesaid.” The testatrix died on June 7, 1946, without having at any time during her life paid for the training of any candidate for the priesthood.

The Westminster Bank Ltd., as the executors and trustees of the will, took out a summons to determine whether the direction was a good, valid and charitable trust, or whether the gift failed, or what, otherwise, was the effect of the direction.

J. B. Richardson for the plaintiff bank.

J. V. Nesbitt; Raymond Walton; Denys Buckley for various defendants.

Cur. adv. vult.

May 26. VAISEY J. reading his judgment, stated the facts, read the material clause in the will, and continued. The general intention of the testatrix, as expressed in that clause, is reasonably clear, and I regret that I cannot hold that effect can be given to it. It is clear that the testatrix had not in her lifetime fulfilled the wish to which the prefatory words of the clause refer. That preliminary difficulty having been surmounted, there follows, so far as words go, nothing but a direction to her trustees to invest a sum of an amount sufficient for the purpose indicated. Before the word “until” I must, in order to make any sense of it at all, insert some such words as “and to keep the same invested.” Having done that, I must next assume that, when the moment indicated by the word “until” arises, the trustees are to sell the investments and use the proceeds for the training of a candidate for the priesthood. I think I know what a candidate for the priesthood is, but the requirement that he must come forward from a particular church is decidedly strange and not in my judgment free from uncertainty. I am inclined to think, though I do not decide, that the education of one ordinand is a charitable purpose, as being for the promotion of the Christian religion.

But the chief difficulty appears to me to be the perpetuity rule. The coming forward of a candidate from St. Saviour’s

Church is an event which might not happen for many years, or at all. What is to happen to the income in the meantime? The gift could only be valid if, the charitable nature of it being assumed, the appropriation of the sum to the indicated purpose is immediate and final. I do not think that the testatrix had any such thought, and I should rather suppose that she would have meant the interim income to fall into residue.

I was pressed to follow the well-known case of *Chamberlayne v. Brockett* (1). But there a general charitable intention was inferred on grounds which do not exist here. It seems to me that a short paragraph in that report applies to the present case. That paragraph reads thus, omitting immaterial words: "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio."

I am also guided, and I think bound, by the decision in *In re Lord Stratheden and Campbell* (2), where there was a bequest of an annuity "to be provided to the Central London Rangers on the appointment of the next lieutenant-colonel." It was held that, as the appointment of the next lieutenant-colonel was an event wholly uncertain, the gift was void because it infringed the rule against perpetuities. Here, too, the coming forward, whatever that may mean, of a candidate from the particular church is a completely uncertain event, which may happen at some future date, unascertained and unascertainable, and may never happen at all.

With considerable regret, similar to that expressed by the judge in the case to which I have last referred, I must assume and will declare that this clause is wholly inoperative. The costs of all parties as between solicitor and client must be paid out of the estate of the testatrix in due course of administration.

Solicitors: *Brash Wheeler, Chambers, Davies & Co.*; *Nicholl, Manisty, Few & Co.*; *Smith & Hudson*, for *T. R. McCready, Plymouth*; *Treasury Solicitor*.

(1) (1872) L. R. 8 Ch. 206, 211. (2) [1894] 3 Ch. 265.

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J.

In re STERN (AN INFANT)

1950

STERN *v.* STERN.

May 5, 12.

Procedure—Maintenance order—Arrears—Enforcement of order—No right to appeal from enforcement order—Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), s. 7, sub-s. 3—Children Act, 1948 (11 & 12 Geo. 6, c. 43), s. 53.

By s. 7, sub-s. 3 of the Guardianship of Infants Act, 1925, an appeal lies to the High Court where a court of summary jurisdiction makes, or refuses to make, an order on an application under the Guardianship of Infants Act, 1886, as amended by the Act of 1925.

No appeal will lie under that sub-section from an order made by a court of summary jurisdiction merely for the purpose enforcing an order previously made by it under the Guardianship of Infants Acts, for such an order of enforcement is made in exercise of a different jurisdiction.

Semble, an appeal will lie from an order made on an application to vary or discharge an order made under the Acts.

Ruther v. Ruther [1903] 2 K. B. 270 and *Griffiths v. Griffiths* (1909) 25 T. L. R. 544 applied.

In re Quesky [1946] Ch. 250 considered.

MOTION to set aside an order of Carmarthen justices.

On November 30, 1945, on a complaint made by the mother, Carmarthen justices made a consent order on the appellant father under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1925, awarding the custody of their infant child to the mother and making an order for payment of 1*l.* a week for its maintenance.

Payments under the order having fallen into arrear, the mother issued a summons, and on March 18, 1950, the justices made an order for the enforcement of the order of November 30, 1945. The father appealed from that order. The matter was not in evidence, but on or about March 18, 1950, the father had made an application for a variation or discharge of the order of November 30, 1945, which was refused; and from that refusal he did not appeal.

The appeal came on for hearing in Chambers on May 5, 1950, when the preliminary question was raised whether the court had jurisdiction to hear it. The matter was adjourned into open court for argument.

H. Tudor Evans for the father. Appeal lies to the High Court from orders made under the Guardianship of Infants Acts under s. 7, sub-s. 3 (1). The appropriate division in matters relating to infants is the Chancery Division. This court therefore has jurisdiction to hear the matter. *Griffiths v. Griffiths* (2) and *Ruther v. Ruther* (3) are distinguishable. Those cases arose under different statutes, where other procedure was prescribed, namely, procedure by case stated for the opinion of the King's Bench Division. They have no application to matters under the Guardianship of Infants Acts, and there is no need here for a case to be stated for the King's Bench Division. No objection is raised to the maintenance order itself. The objection is that the wife has estopped herself by certain letters from claiming arrears. If the court has power to decide this matter under the Guardianship of Infants Acts in the first place, there must be power for this court to review the matter. The Guardianship of Infants Acts are in *pari materia* with the Summary Jurisdiction Acts: but appeal in matters under the former Acts lies to the Chancery Division, because they concern the interest of the infant.

[Counsel referred to the Annual Practice, 1949, vol. 1, p. 2016.]

In re Quesky (4) is not an authority adverse to the appellant father here. That case raised a different point. If it had been intended to incorporate the practice of appeal by way of case stated to the King's Bench Division, the Guardianship of Infants Acts would have made an express provision to that effect. Section 53 of the Children Act, 1948, could not be said to draw in that procedure by inference. Unless there is

(1) Guardianship of Infants Act, 1925, s. 7, sub-s. 3: "Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court . . ."

Section 7, sub-s. 4, was repealed by the Children Act, 1948, s. 53 of which Act was substituted for it. By that section: "An order of a court of summary jurisdiction

"for the payment of money under the Guardianship of Infants Act, 1886, whether made before or after the commencement of this Act, may be enforced, varied or revoked in like manner as an affiliation order, and the enactments relating to affiliation orders shall apply accordingly, with the necessary modifications."

(2) (1909) 25 T. L. R. 544.

(3) [1903] 2 K. B. 270.

(4) [1946] Ch. 250.

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ROMER J. an express provision assigning the matter to another division, it should come to this division. This appeal arises under s. 7, sub-s. 3. That section was drafted after *Ruther v. Ruther* (1) and *Griffiths v. Griffiths* (2). If there were no appeal to the Chancery Division, the husband would be shut out from any appeal, as he could not go to any other division, which would involve considerable hardship.

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Edmund Davies K.C. and *J. Verdi Jenkins* for the wife. The preliminary question of jurisdiction is covered by *Griffiths v. Griffiths* (2) and *Ruther v. Ruther* (1). Although they concern different matters, the principle is the same. There is inherent jurisdiction for the court to enforce its own order, and that is crystallized by statute : s. 7, sub-s. 4 of the Guardianship of Infants Act, 1925 ; s. 53 of the Children Act, 1948. This is not a case of variation or an appeal from an order, it is merely an appeal from a successful attempt to enforce an order. It is not maintainable here.

[They were stopped.]

ROMER J. stated the facts and continued :—At the opening of this appeal it suggested itself to me that this court had no jurisdiction to entertain an appeal from an order made by justices simply enforcing an order previously made by them under the Guardianship of Infants Acts for maintenance of an infant ; and I suggested that the matter should be further looked into. That has been done, and it has been argued before me today.

Mr. Evans, for the father, has contended that this court has jurisdiction to entertain the present appeal. It is, of course, quite clear, and Mr. Evans does not dispute it, that litigants have no inherent rights of appeal : unless a right of appeal is expressly conferred, *prima facie* no appeal will lie. Mr. Evans, while accepting that proposition, says that the father's right to appeal in the present case is statutory and conferred by s. 7, sub-s. 3 of the Guardianship of Infants Act, 1925.

That sub-section is as follows : " Where on an application " to a court of summary jurisdiction under the Guardianship " of Infants Act, 1886, as amended by this Act, the court " makes or refuses to make an order, an appeal shall, in " accordance with rules of court, lie to the High court " Then there is a proviso to which I need not refer.

(1) [1903] 2 K. B. 270.

(2) 25 T. L. R. 544.

It appears to me to be relevant to inquire what orders are authorized by the Guardianship of Infants Acts, 1886 and 1925. By s. 5 of the earlier Act it is provided that the court may make orders as to the custody of infants and the right of access to them of either parent on the application of the infant's mother "and may alter, vary, or discharge such order . . . and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just." By s. 6 the court has power to remove guardians; and by s. 7 it may in certain events declare that the parent is a person unfit to have the custody of the children of the marriage.

Those are the orders which what is left of the Guardianship of Infants Act, 1886, expressly authorizes the court to make; and s. 9, which defines what is meant by "the court," does not include the courts of summary jurisdiction. Section 10 provides that "In England and Ireland an appeal shall lie to the High Court of Justice from any order made by a county court under this Act; and, subject to any rules of court made after the passing of this Act, any such appeal shall be heard by a judge of the Chancery Division . . ." It would appear to me that s. 10, which says that "an appeal shall lie . . . from any order made by a county court under this Act" means any of the orders to which I have referred, including an order under s. 5 altering, varying or discharging a previous order.

By the Act of 1925 certain further powers are conferred on the courts, and s. 7, sub-s. 1 of the Act extends the definition of "court" by saying that "for the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression 'the court' shall include a court of summary jurisdiction," and it then qualifies the powers of that court.

Section 3, sub-s. 1 of the Act of 1925 says: "The power of the court under s. 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant." By sub-s. 2: "Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order

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“ that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable.” It was under that provision that

the order for maintenance dated November 30, 1945, was made.

By sub-s. 4, it is provided that “ Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order.”

Section 4 empowers the court in certain cases to appoint a guardian on the death of the father or the mother of the infant ; and s. 5 confers a power on the court to make orders with regard to testamentary guardians, including the power to order that the mother or father shall pay to the guardian certain sums towards the maintenance of the infant concerned. Section 6 empowers the court to make orders if disputes arise between joint guardians.

By s. 7, sub-s. 4, “ An order of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Act, 1886, as amended by this Act, shall be enforceable in like manner as an order for the payment of a civil debt recoverable summarily.” That sub-section was repealed by the Children Act, 1948, and for it was substituted s. 53 of that Act which provides : “ An order of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Act, 1886, whether made before or after the commencement of this Act, may be enforced, varied or revoked in like manner as an affiliation order, and the enactments relating to affiliation orders shall apply accordingly, with the necessary modifications.”

Returning to the Guardianship of Infants Act, 1925, s. 8 provides for the enforcement of orders for the payment of money, and by sub-s. 1 enacts that persons who are ordered to make payments of money shall give notice of change of address. Sub-section 2 provides that, where the court has made any order for the payment of money under the Guardianship of Infants Acts, the court shall have power to attach a pension or income of the person liable. Section 9 concerns the consents required to the marriage of infants.

It would appear to me that, among the orders made by a court of summary jurisdiction from which an appeal would lie to this court by virtue of s. 7, sub-s. 3 of the Act of 1925, would be a refusal by the court to vary or discharge a previous order when a proper application had been made to the court

asking it so to do ; because that is one of the matters in which the court of summary jurisdiction is expressly authorized to make an order under the provisions of this Act.

But the only question which I have to decide at the moment is whether an order of the justices simply enforcing a previous order for maintenance is one from which an appeal will lie under sub-s. 3 of s. 7. In my judgment the answer is in the negative. It appears to me that the orders to which s. 7, sub-s. 3 relates are orders made by the court of summary jurisdiction under the express provisions of the Act of 1886, as amended by the Act of 1925. It has to be established that the court was asked to make one of the orders which the court is expressly authorized to make under these Acts, and that the court has made such an order on the one hand or refused to make such an order on the other ; and, provided that that is established, an appeal will lie to this court under the express right of appeal conferred by s. 7.

In my view, sub-s. 3 of s. 7 does not extend to any orders other than those which I have attempted to define. It appears to me that that is the logical result of the whole framework of the Acts and also emerges from the opening words of sub-s. 3 of s. 7, which are : " Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, " 1886."

The order from which it is now sought to appeal was not made under or by virtue of the Guardianship of Infants Acts at all, but under the power which the court of summary jurisdiction had for enforcing compliance with its previous order. A court has an inherent jurisdiction to enforce the orders which it makes, but, apart from that, before 1948 the order of a court of summary jurisdiction for the payment of money was, by virtue of sub-s. 4 of s. 7, which was repealed, " enforceable in like manner as an order for the payment of " a civil debt recoverable summarily." In other words, the appropriate machinery up to 1948 was apparently that to which s. 35 of the Summary Jurisdiction Act, 1879, relates. That was the position until the passing of the Children Act, 1948, when in its place was introduced the machinery which is applicable to affiliation orders.

That is the position now, and that was the position when the order under appeal was made. It seems to me that, whether the justices were acting under some inherent jurisdiction or whether they were acting under s. 53 of the Children

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Act, 1948, or however otherwise they were acting in making this order, they certainly were not exercising any powers which were conferred upon them by the Guardianship of Infants Act. They were, on the contrary, exercising the powers the existence of which is recognized by the legislature in sub-s. 2 of s. 8 of the Guardianship of Infants Act, 1925, where it says: "Where the court has made any such order" (that is, an order to make payments) "the court shall, in addition to any other powers for enforcing compliance with the order, have power" to attach a pension or income.

If I am right in thinking that sub-s. 3 of s. 7 of the Act of 1925 is only referring to orders made under the authority of the Guardianship of Infants Acts, then this order was not made under the authority of those Acts, but was made either under the inherent authority or under the Children Act, 1948, and consequently no appeal lies under s. 7, sub-s. 3. It is not suggested that any other right of appeal exists.

That would have been the conclusion at which I should have arrived had the matter been free from authority; but it is not wholly free from authority. The right of appeal under the Guardianship of Infants Acts was considered (although for another purpose) by Vaisey J. in *In re Quesky* (1). That was an appeal to this court from a refusal by justices to give their authority to the marriage of the applicant. Vaisey J. held (and this was the actual point which he decided) that the application was made to the justices not under the Act of 1886 as amended by the Act of 1925, but under the latter Act alone, and that accordingly it was outside the scope of the appellate section, namely, s. 7. But in the course of his judgment, he said (2): "In the present case the application was made to the justices owing to the refusal of consent by the appellant's parents. Now the only provision in the Act of 1925 which deals with appeals is s. 7, sub-s. 3, which provides, so far as material, that where on an application to a court of summary jurisdiction under the Act of 1886, as amended by the Act of 1925, the court makes or refuses to make an order an appeal shall lie to the High Court. The difficulty in the appellant's way is that that from which she seeks to appeal is the making or refusal of an order not on an application under the Act of 1886 as amended by the Act of 1925, but on an application under the Act of 1925 only. It seems to me plain that s. 7, sub-s. 3, relates solely (1) [1946] Ch. 250. (2) Ibid 253.

“ to those matters of guardianship and custody to which both
“ the Acts extend.”

It is, I think, clear that the judge, when saying that “ s. 7,
“ sub-s. 3 relates solely to those matters of guardianship and
“ custody to which both the Acts extend,” did not mean
strictly to confine himself to those matters without more,
but was intending to include in them such ancillary matters
as, for example, access or maintenance. But, subject to that
qualification, which is implicit in what the judge said, I think
that his view of the Act was that the right of appeal was so
confined, and to that extent that supports the view which
I have formed, that it does not extend to an order made by the
justices in the exercise of a jurisdiction which is not a juris-
diction conferred by the Guardianship of Infants Acts them-
selves.

Mr. Evans very properly referred to two cases not under the
Guardianship of Infants Acts, but of some assistance. The
first was *Ruther v. Ruther* (1). The headnote in the Law
Reports states : “ Where an order for a weekly payment by
“ a husband to his wife is made under the Summary Juris-
“ diction (Married Women) Act, 1895, and the wife
“ subsequently commits adultery, the husband is entitled
“ under s. 7 of the Act, on proof thereof before a court of sum-
“ mary jurisdiction, to have the order discharged in spite
“ of a finding by the court that he has been guilty of conduct
“ conducing to the adultery ; and he is not liable to make
“ any further payments to his wife, although the order may
“ not have been in terms discharged by the adjudication as
“ to the wife’s adultery. The decision of a court of summary
“ jurisdiction upon an information or complaint by a married
“ woman alleging that payments due to her from her husband
“ under an order made under the Act of 1895 are in arrear,
“ is not a matter in respect of which an appeal lies under s. 11
“ of that Act to the Probate, Divorce, and Admiralty Division ;
“ but the Court has power to state a case for the opinion of the
“ King’s Bench Division upon a point of law arising on the
“ information.”

Lord Alverstone C.J., said that he was clearly of opinion
that in the circumstances of that case an appeal by way of
case stated lay to that Division of the High Court. Then
he said (2) : “ The Act of 1895 provided a new and amended

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(2) Ibid. 274.

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“ procedure for making orders for the maintenance of wives,
“ and by s. 9 it is enacted that the payment of any sum of
“ money directed to be paid by an order under the Act may be
“ enforced in the same manner as the payment of money is
“ enforced under an order of affiliation.” He goes on to say
what that procedure is, and to discuss the facts of the case,
as he had indicated that the court would do before hearing
the preliminary objection to their jurisdiction.

Wills J. said (1) : “ With regard to the preliminary objection
“ the matter stands thus. Orders for payment made under
“ the Act of 1895 are by s. 9 to be enforced in the same way
“ as affiliation orders ; and on looking at s. 4 of the Bastardy
“ Laws Amendment Act, 1872, one sees what the procedure
“ is. Therefore an order of committal for non-payment is
“ not an order made under the Act of 1895, and is not one to
“ which s. 11 of that Act applies. It stands on the same
“ footing as an order of committal made in an ordinary affilia-
“ tion case. That order is of course subject to the Summary
“ Jurisdiction Act, 1857, s. 2, and to the Summary Jurisdiction
“ Act, 1879, s. 33, which give justices power to state a case
“ after the determination of any information or complaint.
“ These provisions are by s. 54 of the latter Act made specifically
“ applicable to sums due on affiliation orders or on orders
“ enforceable as affiliation orders. The magistrate therefore
“ had jurisdiction to state this case.”

The topic was rather more amply discussed perhaps in the
second case, *Griffiths v. Griffiths* (2). The headnote states :
“ An appeal does not lie to a Divisional Court of the Probate,
“ Divorce, and Admiralty Division from an order merely
“ enforcing the payment of arrears of maintenance due under
“ a separation order made under the Summary Jurisdiction
“ (Married Women) Act, 1895.” The appeal was by a man
against a ruling or decision of the Metropolitan Police Magistrate
sitting at the Thames Police Court ordering him to pay
his wife a certain sum representing 83 weeks’ arrears of main-
tenance payable and due to her under an order dated
September 28, 1903, and made on the ground of his desertion.
Counsel for the wife took the preliminary objection that no
appeal lay to the Divisional Court in respect of the magistrate’s
ruling. He developed that argument and referred to *Ruther*
v. Ruther (3). In the course of the argument the President

(1) [1903] 2 K. B. 275.

(3) [1903] 2 K. B. 270.

(2) 25 T. L. R. 544.

said (1): "But this is not an 'order' for payment at all—that was made in 1903. What this woman is now asking for is that the order should be enforced by payment of the "arrears." Then Bargrave Deane J. asked the husband's counsel what he suggested the magistrate had said or done which was wrong; and the President said: "There has been "no appeal against the original order, not even to vary it. "All you are now objecting to is that the magistrate has "decided that if your client does not pay he must go to prison." The President then said that he was not satisfied that they had jurisdiction to hear the case at all, and asked what records had been drawn up. He was told: "No 'order,' but the "entry in the court records is as follows: '59*l.* 5*s.* and "3*l.* 3*s.* costs d.d. three months'—viz. that failing "payment of the amount of arrears and costs, and in default "of distress, the husband should go to prison for three months."

The report continues (1): "The President, in the course of "his judgment, said that in 1903 the wife obtained an order for "maintenance on the ground of her husband's desertion. "He paid for some considerable time—down to June, 1907— "when he fell into arrears now amounting to 59*l.* 5*s.*, repre- "senting 83 weeks. In these circumstances the wife applied "to the magistrate to enforce payment, and the husband having "appeared before the magistrate, and the wife stated her "case, the magistrate made what (for want of a better "expression) he (the learned President) would call an 'order,' "directing payment of the arrears, or distress, or in default "imprisonment in the terms of s. 4 of the Bastardy Amendment "Act, 1872 (35 and 36 Vict., c. 65), as provided for by s. 9 of "the Act of 1895. That order the magistrate had jurisdiction "to make, as the original order of 1903 had never been appealed "against, nor had any attempt been made to vary or rescind "it, and the order which it was now sought to appeal against "was merely one enforcing payment of the sums due under "the order of September 28, 1903. This court was not, under "s. 11 of the Act of 1895, in such circumstances the proper "tribunal to appeal to, and the judgments of the Lord Chief "Justice and of Wills J. in '*Ruther v. Ruther*' (2), were con- "clusive on that point, and that case was a distinct authority "for the proposition that an appeal does not lie to the Divorce "Divisional Court from an order merely enforcing payment "of money." The court allowed the preliminary objection.

(1) 25 T. L. R. 545.

(2) [1903] 2 K. B. 270, 274, 275.

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Mr. Evans argues that those cases are distinct, concern different statutes, and relate to orders which the magistrates had apparently made under s. 4 of the Bastardy Laws Amendment Act, 1872. He also suggested that in *Griffiths v. Griffiths* (1) the views of Bigham P., were to some extent coloured by the impression which he had formed on the merits.

It is true that neither of those cases arose out of the Guardianship of Infants Acts ; but it appears to me that they do afford considerable guidance as to the attitude which this court ought to adopt, especially having regard to the fact that the affiliation machinery has now been incorporated in the Guardianship of Infants Acts by s. 53 of the Children Act, 1948, for the purpose of enforcing orders which have been made for maintenance ; and they bear out, I think, the view which I have formed.

Mr. Evans contends that there clearly ought to be a right of appeal from the order which the justices have made, and that, inasmuch as matters relating to infants have always been assigned to this Division or to its predecessor, the Court of Chancery, this court is the proper court to hear such an appeal. As I say, there is no right of appeal unless it is expressly conferred by statutory authority, and I have already explained that, in my view, this appeal is not within the only statutory authority to which the appellant father can point, namely, s. 7, sub-s. 3, of the Act of 1925.

That is enough to conclude this case, and it is not necessary, I think, for me to express any further views as to what rights, if any, the father may have. But I should point out, with regard to any contention founded upon hardship, that, if he has no right of appeal to any other court from an order which the justices have made, that does not result in the hardship which is suggested ; for he himself made an application to the justices, as I understand it, to deal with the order of 1945 by varying it or discharging it. In other words, he made an application to the justices to exercise the statutory jurisdiction conferred by the Guardianship of Infants Acts themselves on the court of summary jurisdiction by s. 3, sub-s. 4 of the Act of 1925 and s. 5 of the Act of 1886. Inasmuch as the court refused to make an order, it appears to me, though I do not decide it because it is not before me, that this court would have power to entertain an appeal from such a refusal under s. 7, sub-s. 3 of the Act of 1925.

(1) 25 T. L. R. 544.

Accordingly, a man in the position of the father in this case could make such an application at any time, and, if it failed, he could have the matter brought before this court for review. But what he cannot do, as I hold, is to ask this court to review, by way of appeal, an order made by the justices merely for the purpose of enforcing an order previously made for maintenance—an order enforcing it in the sense that it is an order compelling the father, against whom the previous order has been made, to comply with its terms.

Accordingly, I hold that I have no jurisdiction to entertain this appeal and I must dismiss it,

Appeal dismissed.

Solicitors : *Lynch, Hall & Son ; Helder, Roberts, Giles & Co., agents for W. H. Rogers & Rogers, Carmarthen.*

I. G. R. M.

In re PRIMROSE (BUILDERS) LD.

[No. 00282 of 1949.]

Company—Winding up—Preferential debts—Payments for wages—Rule in Clayton's case—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 319, sub-ss. 1, 4.

The priority in a winding up granted by s. 319, sub-s. 4 of the Companies Act, 1948, to a person who has advanced money to enable payments to be made to employees as specified in the subsection is not conditional on that person's showing that the money was so advanced in pursuance of any agreement or arrangement ; nor is it incumbent on such a person to assert and prove that his aim in so advancing the money was to become a preferential creditor.

In the compulsory winding up of a limited company, their bankers claimed to rank as preferential creditors in respect of amounts which they had advanced to the company within the four months immediately before the winding up. The advances were made on cheques drawn by the company on the bank for " wages " or, exceptionally, for " cash." Details of the manner in which payment was required were written on the back of the cheque, and when each cheque was presented the bank insisted, before agreeing

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

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to honour it, that the company should show to the satisfaction of the bank that an amount equal to or exceeding the amount of the cheque would shortly be paid into the company's account. No payments made into the company's account were ever appropriated by the company or the bank to meet any particular payments out. Throughout the material four months the company's account was overdrawn.

Held, that the bank were entitled under s. 319 of the Act of 1948 to rank as preferential creditors in respect of the advances, since the insistence by the bank on satisfactory proof that sufficient funds would be paid into the account shortly after each advance was made did not constitute an appropriation of a particular payment to meet a particular drawing, and there was no agreement for such an appropriation with the result that the rule in *Clayton's* case applied.

National Provincial Bank, Ltd. v. Freedman (1934) not reported, followed.

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Primrose (Builders) Ltd. were incorporated in December, 1947, and on April 30, 1948, opened a current account with the National Provincial Bank, Ltd., the bank agreeing that the company should be permitted to overdraw the account up to a limit of 175*l.* Subsequently, the authorized limit was raised, first to 3,500*l.* and then to 5,500*l.*, in each case upon a guarantee supported by collateral securities. Throughout the whole period of the account, it was conducted as a normal current account.

In July, 1948, the bank became anxious to reduce the overdraft and informed the company that, in the absence of further credits, drawings on the account must be restricted to payments for wages. The manager of the branch at which the company's account was kept agreed on two occasions to allow the company to draw two cheques for wages pending the receipt of a remittance which the managing director of the company said that he was expecting to receive. Subsequently the bank informed the managing director that the overdraft must be reduced substantially within a reasonable period. Between January 9, 1949, and May 9, 1949, when the winding-up order was made, the company presented nine cheques made out in the first two cases to "cash," and in the remainder to "wages." The details of the manner in which payment was required was written on the back of the cheques, and on every occasion the bank manager or his assistant declined to agree to honour the cheque, until he was satisfied that

a payment or payments substantially equal to or exceeding the amount for which the cheque was drawn would shortly be paid into the account.

On May 9, 1949, the company were ordered to be wound up compulsorily. The bank lodged a proof with the liquidator, claiming as preferential creditors in respect of 3,646*l.* 8*s.* 11*d.*, being money advanced to the company for the purpose of paying wages, salaries and holiday remuneration during four months before the winding-up order. (The amount claimed was afterwards reduced to 2,524*l.* 9*s.* 11*d.*) The liquidator rejected the bank's claim to rank as preferential creditors, and the bank took out this summons to establish their rights (1).

P. J. Sykes for the National Provincial Bank, *Ld.* In order to qualify as a preferential creditor under s. 319, sub-s. 4, it is not necessary to show that payments made for wages were paid in pursuance of an agreement to that end, or that they were made with a view to becoming a preferential creditor. It is only necessary to show that the advances were in fact made for the purposes specified in the sub-section. Whether the cheques were made out to "cash" or to "wages," they were intended for the purpose of paying wages and the bank in fact advanced the money for that purpose. If an account with a bank is in debit and the bank honour a cheque made payable to wages or made payable to cash in such circumstances that it is evident that the bank knew that it

(1) Companies Act, 1948, s. 319, sub-s. 1: "In a winding up there shall be paid in priority to all other debts inter alia (b) all wages or salary . . . of any clerk or servant in respect of services rendered to the company during four months next before the relevant date," which, under s. 319, sub-s. 8 (d), is, in the case of a company which has been ordered to be wound up compulsorily, the date of the order, assuming, as was the case here, that no provisional liquidator has been appointed.

Sub-section 4: "Where any payment has been made—(a) to any clerk, servant, workman or labourer in the employment of a company, on account of wages

"or salary; or (b) to any such clerk, servant, workman or labourer or, in the case of his death, to any other person in his right, on account of accrued holiday remuneration; out of money advanced by some person for that purpose, the person by whom the money was advanced shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which the clerk, servant, workman or labourer, or other person in his right, would have been entitled to priority in the winding up has been diminished by reason of the payment having been made."

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was to be used for paying wages, then, unless there is evidence to the contrary, it must be assumed that the cheque is in fact used for the purpose of paying wages. In this case the evidence supports that assumption. The account was carried on as an ordinary current account as between banker and customer; pass sheets were issued regularly to the company; and no objection was ever taken to the form of the account.

The rule in *Clayton's case* (1) applies in the absence of positive proof that the parties had agreed to displace it. *National Provincial Bank v. Freedman* (2) is directly in point for it is clear that the payments made by the company to the credit of their account were used to reduce the overdraft, and that they were not allocated to wages.

O. J. Shaw for the liquidator. In order to qualify under s. 319, sub-s. 4, the advance must be made with a purpose directly related to the object or purpose of the person seeking to draw the money. That is the meaning of "purpose" in that sub-section. [He referred to the definitions of "purpose" in the Oxford English Dictionary and Stroud's Judicial Dictionary (2nd ed.)] The bank had a purely commercial basis in making these advances: they were not made for the "purpose" of paying wages. The bank may have expected that, in the ordinary course of business, some of the money which they advanced would be spent on wages; but they had no real "purpose," in making the advance, that it should be so spent.

On each occasion after July, 1948, when the bank honoured a cheque drawn in excess of the agreed overdraft they did so in pursuance of a special agreement relating to that particular cheque. These agreements were separate and distinct from the original agreements to allow an overdraft. Each advance constituted a separate contract and amounted to a special appropriation by the bank, the bank manager signifying his intention to appropriate by refusing to make an allowance unless the company satisfied him that a cheque would be paid in within a short time. That is strong evidence to rebut the presumption that the rule in *Clayton's case* (1) applies. He referred to *Clayton v. Luckin* (3), *Bowes v. Lucas* (4) and *Deeley v. Lloyds Bank Ltd.* (5).

These were separate advances made by the bank, and they

(1) (1816) 1 Mer. 572.

(4) (1737) Andr. 55.

(2) (1934) Not reported.

(5) [1912] A. C. 756, 769.

(3) (1729) Mosely, 251.

have been repaid by the credits which were paid into the accounts after each cheque was honoured. *National Provincial Bank, Ltd. v. Freedman* (1) is distinguishable, for there the payments into the account were made before the cheques were honoured.

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WYNN-PARRY J. [after stating the facts and reading s. 319, sub-ss. 1 and 4 of the Act of 1948]. It is to be observed, in regard to sub-s. 4, that there is no obligation upon the person seeking to rank as a preferential creditor to show that the money advanced for the purposes specified in paras (a) and (b) of that sub-section was advanced pursuant to any agreement or arrangement; nor is it incumbent on that person to assert and prove that his aim in so advancing the money was to become a preferential creditor. If he satisfies the conditions in the sub-section, he will achieve the priority given by the section.

[His Lordship reviewed the evidence, accepting that of the bank manager that no payments into the account of the company were ever appropriated either by the company or by the bank to meet any particular payments out, and that there was no agreement between the company and the bank that there should be any such appropriation, and continued :] It is argued for the liquidator that each advance was made in pursuance of a special arrangement relating solely to that advance, the terms being that the advance in question should be repaid within a short time through the expected credit's being paid in.

Mr. Sykes insisted that no such arrangement was ever made, and that the only object which the bank manager had on each occasion, in being satisfied that payments substantially equal to the particular wages cheque should be paid in, was to ensure that in the result the overdraft should not be substantially increased.

Mr. Shaw for the liquidator relies on a statement by the bank manager, made on November 13, 1948, to the managing director of the company, that no increase in the borrowing would be allowed and that wages would have to be provided for, or any increase in the overdraft be secured. The bank manager explained that by the words "provided for" he meant that the overdraft must not increase by the payment of the wages cheques, and that there must be sums paid in to the account to prevent such an increase.

(1) (1934) Not reported.

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On behalf of the liquidator it is said that that admittedly somewhat loose language supports his contention that there was this special arrangement in each case ; but that when such a conversation is related to the context, and when one remembers that it had been impressed upon the bank manager that, while the bank were willing, so far as they could, to honour cheques for wages, they were not willing that the overdraft should be increased and, indeed, were anxious that it should be permanently reduced, the words used by him have a very different significance.

National Provincial Bank, Ltd. v. Freedman (1) is a very similar case to this one, and it is unfortunate that it did not find its way into the reports. In that case, Clauson J. said, upon an almost exactly similar contention: "The truth of it is that danger always occurs when loose expressions used by the people whose business it is to carry on the details of business are regarded with more attention than the real settled methods of business which appear in the books kept by banks and other responsible persons."

In the present case, the account which the bank kept with the company, the pass sheets relating to which were regularly supplied to the company and which evoked no protest from them, disclosed a true current running account.

The matter really comes down to this : is the rule in *Clayton's case: Devaynes v. Noble* (2) to be applied to this account, or is there sufficient evidence of an agreement between the parties that that rule, which is only a presumption, does not apply as regards these particular cheques drawn for "cash" or "wages"? In my view, the rule in *Clayton's case* (2) does apply : there is no evidence upon which a court could come to the conclusion that by agreement between the parties that rule was not to apply in any particular instance.

I am fortified in that conclusion by this statement by Clauson J., in *National Provincial Bank, Ltd. v. Freedman* (1) : "There is a suggestion that there were conversations of a somewhat loose character from which it can be inferred that there was an arrangement that the cheques paid in were to be used simply to provide the cash to pay the wages. What seems to me to be most important is the way in which the account was kept. The way the account was kept shows perfectly clearly that that was not the transaction at all. The transaction was that these cheques reduced the over-

(1) (1934) Not reported.

(2) 1 Mer. 572.

“ draft, and that is the meaning of the bank account as it appears. I have got it before me. The cheques reduced the overdraft. The bank manager, whatever loose language he may have used, was not going to let the overdraft be permanently increased, and accordingly it was necessary for him to take care that the wages cheque was not paid until these cheques had gone into the account. But those cheques did not provide the wages ; those cheques reduced the overdraft, and the wages cheque was paid by money which was advanced by the bank for the purpose. And that is shown in the clearest terms in the form of the account.”

The only possible distinction which can be drawn between that case and the present is that, owing to the greater degree of accommodation which the bank were prepared to afford in this case, the wages cheques were honoured before the expected credits were received. So far from that affording a reason for not following the earlier case, it appears to make the present case an a fortiori one.

In those circumstances, the conditions of s. 319, sub-s. 4 of the Companies Act, 1948, are fulfilled by the applicants, because it is agreed that the moneys advanced by the bank, 2,524*l.* 9*s.* 11*d.*, in the circumstances to which I have referred, were applied in the payment of wages, and I find as a fact that those moneys were advanced by the bank for that purpose.

Declaration accordingly.

Solicitors : *Wilde, Sapte & Co. ; J. E. Baring & Co.*

In re NAYLOR BENZON MINING CO., LD.

[1949 N. 965.]

Mines and minerals—Application for grant of right to work minerals—Assessment of compensation—“ Fair and reasonable between a willing grantor and a willing grantee ”—Mines (Working Facilities and Support) Act, 1923 (13 & 14 Geo. 5, c. 20), s. 9, sub-s. 2—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 81.

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

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On an application, made after the Town and Country Planning Act, 1947, came into force on July 1, 1948, for a grant under the Mines (Working Facilities and Support) Act, 1923, s. 5, sub-s. 1, of the right to work certain ironstone on terms which were "fair" and reasonable as between a willing grantor and a willing "grantee," in pursuance of s. 9, sub-s. 2, of the Act of 1923 ;

Held, that, in determining the amount payable to the mineral owner under s. 9, sub-s. 2, the court was not bound by an agreement made inter partes for it was the guardian of the national interest in exercising its jurisdiction under that sub-section ; that it should adopt the principles of valuation applicable to valuations made under the Lands Clauses Consolidation Act, 1845, s. 63 as stated in *South Eastern Ry. Co. v. London County Council* [1915] 2 Ch. 252, and that it should compensate the owner on the basis of the value to him of the minerals which were taken from him, the valuation being made on the basis of values immediately before July 1, 1948, because the Town and Country Planning Act, 1947, made no provision for mining leases which came into existence between that date and the approval of a development plan in the relevant area.

In re Nunnery Colliery Company's Application (1924) 69 S. J. 52 ; *In re J. and J. Charlesworth, and Henry Briggs, Son & Co. Ltd.* (1926) 43 T. L. R. 100 ; *South Eastern Ry. Co. v. London County Council* [1915] 2 Ch. 252 ; *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 K. B. 16 ; *Corrie v. McDermott* [1914] A. C. 1056, considered and applied.

ADJOURNED SUMMONS.

The applicants, Naylor Benzon Mining Co., Ltd., were the owners in fee simple of land at Nassington and Yarwell, in the county of Northampton, adjoining land, the subject of the application, owned by the respondent, Dunkerley. Part of Dunkerley's land was the subject of a licence to Kingscliffe Super Refractories, Ltd., for the purpose of winning clay, and substantially the remainder of the land was used for agricultural purposes. Since 1939, the applicants had mined their land for ironstone by surface working, and, as it was nearly worked out, they negotiated with Dunkerley for a lease of the mining rights in his land. Dunkerley would not accept the terms which the company offered, and on May 7, 1949, they applied to the Minister of Fuel and Power for a grant of facilities under the Mines (Working Facilities and Support) Acts, 1923 and 1925 (1), as amended by the

(1) Mines (Working Facilities and Support) Act, 1923, s. 5, sub-s. 1: "Any person having	" those minerals, or any adjacent
" an interest in any minerals who	" minerals, and who considers
" is desirous of working	" that the circumstances are such
	" that a right to work the minerals
	" can be granted under this Part

Mining Industry Act, 1926, and the Mines (Working Facilities) Act, 1934, which applied the earlier provisions to ironstone. The Minister of Fuel and Power now exercised the powers of the Board of Trade under those Acts; and as a result of the Railway and Canal Commission (Abolition) Act, 1949, which transferred to the High Court the functions of the Commission under those Acts the matter now came before the court on this summons, the applicants asking for an order in the form of a draft lease submitted by them.

The terms of the proposed lease which were in dispute were as follows: By cl. 4 (which concerned the quantum of royalty payments): "Yielding and paying therefor yearly "and every year during the term the following rents royalties "or sums of money clear of all deductions (except as herein- "after provided) half-yearly on the first day of April and the

"of this Act, may send to the "Board of Trade an application "for the grant of such a right."

Sub-section 4: "The Board "shall consider the application, "and shall . . . refer the "matter to the Railway and "Canal Commission."

Section 9, sub-s. 2: "The "compensation or consideration "in respect of any right, including "a right to enforce restrictions, "shall be assessed by the Com- "mission on the basis of what "would be fair and reasonable "between a willing grantor and "a willing grantee, having regard "to the conditions subject to "which the right is or is to be "granted."

Mining Industry Act, 1926, s. 13, sub-s. 1: "Any person "who is desirous of searching for "or working, either by himself "or through a lessee, any coal "may, under and in accordance "with Part I of the Mines " (Working Facilities and Support) "Act, 1923 (' . . . the principal "Act') make an application to "search for or work the coal, "and, on such an application "being referred to the Railway

"and Canal Commission under "the principal Act, the Commis- "sion may, subject to the "provisions of the principal Act, "grant the right if they consider "that it is expedient in the "national interest that the right "should be granted to the "applicant."

Sub-section 4: "The principal "Act shall, as respects coal, "have effect as if in section 5 the "words 'having an interest in " 'any minerals,' and 'those " 'minerals or any adjacent,' " . . . were omitted."

Mines (Working Facilities) Act, 1934, s. 1: "Section 13 of the "Mining Industry Act, 1926, "which empowers the Railway "and Canal Commission, on an "application referred to them by "the Board of Trade, to grant "to the applicant the right to "search for or work coal or, as "the case may be, the right to "work coal freed from existing "restrictions and conditions or "upon substituted terms and "conditions, shall apply also in "relation to any mineral to which "this Act applies . . . (iron ore "and ironstone being included)."

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“ first day of October in every year. (i) The surface rent
“ of two pounds for every acre and so in proportion for any
“ less quantity than an acre of the described lands of which
“ the lessees may have taken possession for the purpose of
“ this lease by notice as hereinafter provided such last
“ mentioned rent to commence from the day when the lessees
“ take possession thereof and to be paid until such land
“ be handed back as hereinafter provided and the first half-
“ yearly payment or a proportionate part thereof to be made
“ on such one of the said half-yearly days appointed for the
“ payment of rent as shall happen next after such taking
“ of possession Provided always that nothing herein contained
“ shall be deemed to render the lessees liable to pay surface
“ rent under the provisions of this sub-clause in respect of
“ any land which they now hold or may hereafter take on
“ agricultural tenancy. (ii) In addition to the surface rent
“ hereinbefore mentioned (but subject to the provisions
“ hereinafter contained) the following royalties, viz.: (a) for
“ every ton of two thousand six hundred and forty pounds
“ (hereinafter referred to as ‘ a royalty ton ’) of raw ironstone
“ raised or gotten during each year by the lessees out of the
“ described lands a royalty of five pence per royalty ton
“ where the overburden does not exceed thirty five feet
“ in thickness four pence per royalty ton where the over-
“ burden is between thirty five feet and fifty feet and three
“ pence per royalty ton where the overburden exceeds fifty
“ feet or the minerals are mined by underground operations.
“ (b) For every royalty ton of gravel limestone building stone
“ ganister or other stone or building sand raised or gotten
“ during each year by the lessees out of the described lands
“ a royalty of three pence.” By cl. 6 (which concerned
restoration payments): “ The applicants may on April 1
“ or October 1 in any year hand back to the lessor all or so
“ much of the surface of the described lands which the lessees
“ shall have entered upon and which they shall no longer
“ require for the purpose of carrying on their works on the
“ payment of the following amounts in respect of every acre
“ and so in proportion for any less quantity than an acre
“ of land so handed back to the lessor which shall not have
“ been restored as aforesaid: (i) Where the overburden
“ is forty feet in thickness or under and the ironstone is not
“ mined at the rate of thirty pounds per acre; (ii) Where
“ the overburden is over forty feet in thickness or the iron-

“ stone is mined at the rate of twenty pounds per acre.
 “ Provided that if the lessee shall be required under the
 “ provisions of the Town and Country Planning Act, 1947,
 “ or any other Statute or Rule, Order or Regulation made
 “ thereunder, or under any Planning Permission or Develop-
 “ ment Plan to restore the demised lands or any part or parts
 “ thereof to agriculture and/or to level the same and/or to
 “ afforest the same and/or to effect any other restoration
 “ or rehabilitative treatment or reinstatement of the same
 “ then the amount payable under this sub-clause in respect
 “ of such lands when handed back to the lessor shall be reduced
 “ by such sum per acre as is provided for in clause 8 (c) hereof
 “ to the intent that such abatement may be either of the
 “ amount payable under this sub-clause or of the royalties
 “ or both as may be just and appropriate having regard to
 “ the expenditure incurred or to be incurred.”

By cl. 8 (which made provision for adjustment of the terms of the lease having regard to the expropriation of mineral rights by the Town and Country Planning Act, 1947, s. 81 (1), and the Regulations (2) made under that section and also to the incidence of development charges on the applicants, when the charges were assessed): “ The royalties and other
 “ payments required to be made hereunder shall be varied
 “ by the parties hereto so far as may be just having regard
 “ to the development charge payable by the lessees under the

(1) Town and Country Planning Act, 1947, s. 81, sub-s. 1: “ In
 “ relation to development con-
 “ sisting of the winning and
 “ working of minerals, the pro-
 “ visions of this Act shall have
 “ effect subject to such adapta-
 “ tions and modifications as may
 “ be prescribed by regulations
 “ made under this Act with the
 “ consent of the Treasury.”

By sub-s. 3: “ Regulations
 “ made for the purposes of this
 “ section shall provide for securing
 “ —(a) that, where a development
 “ charge is payable under Part VII
 “ of this Act in respect of the
 “ winning and working of minerals
 “ comprised in a mining lease
 “ which was in force on the
 “ appointed day, the royalty or

“ other payment required to be
 “ made under the lease may be
 “ varied, by such tribunal as may
 “ be prescribed by the regulations,
 “ so far as may be just having
 “ regard to the amount of the
 “ charge; (b) that where a
 “ development charge is payable
 “ under the said Part VII in
 “ respect of the winning and
 “ working of minerals authorized
 “ by an Order made under Part I
 “ of the Mines (Working Facilities
 “ and Support) Act, 1923, the
 “ provisions of the Order may be
 “ varied by the Railway and
 “ Canal Commission so far as may
 “ be just having regard to the
 “ amount of the charge.”

(2) Statutory Instruments 1948,
 No. 1521 and 1522.

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“ said Town and Country Planning Act in respect of any
 “ development permitted within the terms of this lease and
 “ to any burden or obligation imposed or expenditure incurred
 “ or to be incurred pursuant to planning permission or any
 “ Statute or Statutory Rule and order in restoring the demised
 “ premises to agriculture and/or in levelling the same and/or
 “ in afforesting the same or any other restoration or rehabilitative
 “ treatment or reinstatement of the same or any part thereof
 “ and in the case of a dispute or difference the same shall be
 “ referred to arbitration in manner hereinafter provided
 “ and such variation shall be retrospective to and recoverable
 “ accordingly from the date of the decision of the Central
 “ Land Board or the Planning Authority whichever shall
 “ be the earlier.” A further question was raised by the
 East Midland Electricity Board, which does not call for report.

C. L. Henderson K.C. and *J. L. Arnold* for the applicants.
 The applicants have put forward terms for the approval
 of the court and they do not desire to resile from them. Since
 the passing of the Town and Country Planning Act, 1947,
 it would not, however, be proper for a mineral owner to receive
 as high a royalty as he would have done before the Act, for
 the expropriation of mineral rights by the Act reduced the
 value of the mining rights in the minerals to a nominal amount.
 If the company took a lease providing for payments on the
 basis of what would have been commercially reasonable
 before the Act of 1947, they would be open to attack under
 ss. 13 and 25 of the Iron and Steel Act, 1949. Where, as in
 this case, the lease related to a period before the development
 plan under s. 5 of the Town and Country Planning Act, 1947,
 came into force, it is essential to assess the royalty payments
 on the basis of the unrestricted value of the minerals and to
 add provisions first for scaling down the payments so that
 they will dovetail with the restricted value of the minerals
 and the amount of the development charge when that charge
 has been assessed; and, second, for varying the restoration
 payments in the event of conditions being attached to the
 right to develop. These considerations are relevant in
 assessing the amount of the compensation payable under s. 9,
 sub-s. 2, of the Act of 1923. In making that assessment,
 the court is guardian of the national interest and is not bound
 by any agreement made *inter partes*. (Counsel referred to

In re Nunnery Colliery Company's Application (1), and *In re J. and J. Charlesworth and Henry Briggs* (2).) Since the Lands Clauses Consolidation Act, 1845, the prime test in valuing for compulsory purchase is the value to the vendor of the thing being purchased : *South Eastern Ry. Co. v. London County Council* (3). It is wrong to take into account the special value which the property may have to the particular purchaser who has obtained power of compulsory purchase : *In re Lucas and Chesterfield Gas & Water Board* (4).

Lindner for the respondent, *Dunkerley*. Having regard to the nature of the application and the terms of the summons, it was not open to the court to make an order granting terms which were less favourable to the respondent than those which the applicants had themselves proposed. Even if the court had jurisdiction to override the proposed terms, nothing less favourable should be ordered. The proposed terms are indicative of what the applicants as grantees would consider "fair and reasonable" and they are willing grantees for the purpose of s. 9, sub-s. 2, of the Mines (Working Facilities and Support) Act, 1923. There is no direct authority on the interpretation of that sub-section but *Inland Revenue Commissioners v. Clay* (5) gives some guidance and shows that a willing purchaser or a willing grantee is a person who would be willing to purchase provided that he would only have to pay a fair price having regard to the whole of the circumstances. It is proper to take account of the special value which the land might have to a particular purchaser.

Milner Holland K.C. and *Hesketh* for the Kingscliffe Super Refractories, Ltd.

Ramsay Willis for the East Midland Electricity Board.

Cur. adv. vult.

1950. Feb. 8. WYNN-PARRY J. [reading his judgment, stated the facts and continued:] The only matters which are in dispute between the parties are, first, the quantum of royalty payments and restoration payments, and secondly, the necessity for providing, and the method of providing, against the position which will arise under the Town and

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(1) (1924) 69 S. J. 52.

(2) (1926) 43 T. L. R. 100.

(3) [1915] 2 Ch. 252, 258.

(4) [1909] 1 K. B. 16.

(5) [1914] 3 K. B. 466.

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Country Planning Act, 1947, if and when a development plan under that Act affecting the land in question comes into force. [His Lordship read cll. 4 and 6 of the draft lease and continued as follows:] As regards these questions, the course of events since the issue of the originating summons is somewhat curious. It is clear from the evidence, first that the applicants were anxious to come to an amicable agreement with the respondent Dunkerley if possible; secondly, that they considered what from their point of view would represent a good commercial transaction, taking into account that, for the reasons to which I have already referred, they were in a particularly favourable position to conduct mining operations on Dunkerley's land; and thirdly, that with this in mind, they put forward the suggested terms as to royalty payments in order to induce Dunkerley to come to an agreement. Dunkerley was not satisfied with the terms offered, either as regards royalty or restoration payments, and he persisted in his objection until the afternoon of the first day of this hearing, when he intimated through his counsel that he would be willing to accept the draft lease as it stood, with certain amendments made since the issue of the summons, and would not therefore oppose the quantum of the royalty or restoration payments.

This, however, could not end the matter because the applicants' offer was no longer open. [His Lordship then referred to the expert evidence given on behalf of the applicants that the scale of royalty payments provided in the draft lease was higher than a mineral owner might reasonably expect to pay for the type of ironstone in question under a lease entered into before July 1, 1948, and continued:] The applicants do not desire to resile from the terms put forward in the draft lease, and I am quite satisfied that they obtained the evidence of their expert witness to justify those terms and not in the least with a view to enabling them to make out a case for resiling. Their submission is that the combined effect of that evidence and ss. 13 and 25 of the Iron and Steel Act, 1949 (1), assuming that it should come

(1) The Iron and Steel Act, 1949, s. 13, sub-s. 1: "Where
" any company which comes into
" public ownership under this
" Part of this Act has made or
" varied an agreement or lease

" on or after the twenty-first day
" of October, nineteen hundred
" and forty-seven, and before
" the date of transfer, and the
" agreement or lease remains
" unperformed or unexpired, in

into operation, creates such a position that, although they do not seek to resile from the terms of the draft lease, they cannot safely consent to it. With that submission I have every sympathy. [His Lordship then read s. 13, sub-s. 1, and continued:] The vital provision in s. 13, sub-s. 1, is contained in the words "and the corporation are of opinion "that the making or variation of that agreement or lease "was not reasonably necessary for the purposes of the "activities of the company." Upon the application of that provision may turn the rights of many parties involving, may be, large sums of money, yet the corporation are invited to form an opinion one way or another upon a test which, as expressed in the sub-section, does not begin to be expressed in the King's English. The words "reasonably necessary," used as a phrase in which the adverb is designed to qualify the adjective, are meaningless. A thing is necessary or it is not necessary. It may be regarded or treated as necessary in one context and not in another, but the context cannot be provided by merely preceding the word "necessary" with an adverb such as "reasonably."

As it stands, the phrase, to me, is a contradiction in terms. The legislature, presumably, in its wisdom, has not thought fit to throw the burden of interpreting and applying this apparently meaningless phrase on the High Court, but instead upon the arbitration tribunal. I am therefore spared the task of considering it further. I felt it necessary to advert to it, because honest business men coming before the High Court on an application such as this are entitled to protection

" whole or in part, on the date
 " of transfer, and the Corporation
 " are of the opinion that the
 " making or variation of that
 " agreement or lease was not
 " reasonably necessary for the
 " purposes of the activities of
 " the company, or that the agree-
 " ment or lease was made or
 " varied with an unreasonable
 " lack of prudence on the part
 " of the company, regard being
 " had in either case to the circum-
 " stances at the time, the company
 " shall, if so directed by the
 " Corporation, by notice in writing
 " given to the other parties to

" the agreement or lease at any
 " time within six months after
 " the date of transfer, disclaim
 " the agreement or lease :
 " Provided that any of the said
 " other parties may, within two
 " months after the date on which
 " the notice is served, refer to
 " arbitration under this Act the
 " question whether or not the
 " agreement or lease ought to be
 " disclaimed under this section,
 " and the Corporation (as well
 " as the publicly-owned company)
 " shall be made a party to the
 " arbitration."

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against the possible dangers with which they may in the future be faced as a result of the use in an Act of Parliament of such sloppy language as this. The urgency and importance of this aspect of the matter is only emphasized by the provisions of s. 25, sub-s. 2, under which "all parties to the transaction, and all persons who were directors of the company" at the time when the transaction was entered into may find their pockets threatened in regard to a transaction in respect of which the arbitration tribunal may have to express an opinion as to whether or not the transaction was "reasonably necessary."

In face of these sections and the possibility that they may come into operation, I am of opinion that the applicants are justified in taking up the attitude which they do, namely, that they cannot actively consent to enter into a lease in the form of the draft proposed, but that they leave themselves entirely in the hands of the court.

I propose to determine the matter without any further regard to the Iron and Steel Act, 1949, except that I make and proceed on the assumption that both the corporation and the tribunal, if the lease authorized by this order should come before them would have regard to the substance, and not merely the form of this order, namely that it is an order for which this court takes full responsibility, and that it directs the execution of an agreement inter partes for purposes of convenience only. If I had any fear that a contrary view could possibly prevail, I should not hesitate to dispense with the document inter partes, and direct that every term should be set out in the body of the order.

On behalf of the respondent, Dunkerley, Mr. Lindner pressed on me the submission that the applicants were bound by the terms of the draft lease, which they themselves had put forward, and that it was not open to the court to grant the authority asked for on terms which would be less favourable to Dunkerley. I cannot accept this contention. In exercising the present jurisdiction the court is the guardian of the national interest and cannot be bound by any agreement between the parties before it, nor a fortiori by an offer put forward by one of them. If authority for this proposition be wanted, it will be found in *In re Nunnery Colliery Company's Application* (1), and *In re J. and J. Charlesworth, Ltd., and Henry Briggs, Son & Co. Ltd.* (2). I have already stated

(1) 69 S. J. 52.

(2) 43 T. L. R. 100.

that it is common ground between the parties that the order should take the form of approving the form of a lease inter partes. It is also necessary that these terms should represent what would have been fair and reasonable between a willing grantor and a willing grantee (see the Mines (Working Facilities and Support) Act, 1923, s. 9, sub-s. 2) if the lease had been entered into immediately before July 1, 1948, the appointed date under the Town and Country Planning Act, 1947. The adoption of this basis is necessitated, partly because of what the legislature has enacted, but even more because of what it has failed to enact.

[His Lordship read s. 81, sub-s. 1, and s. 5, sub-s. 1 (1), of the Act of 1947, and continued :] It is manifest that there is a serious gap because there is no provision for the case of a mining lease brought into existence in the period between the appointed date—the very case before this court—and the approval of a development plan in regard to the area comprised in such lease. In the present case, which is the first of its kind to come before the court, the ingenuity of the applicants has devised a method of avoiding the consequences of this gap, namely, of putting forward a draft lease substantially in the form in use in the district before the appointed date under the Town and Country Planning Act, 1947, with a view to the insertion in it of royalty payments on the scale which would have been fair and reasonable as between a willing grantor and a willing grantee if the Act had never been passed, and including machinery in the form of the proviso to sub-cl. (c) of cl. 8 providing for adjustment of the royalties and other payments when the development charge payable by the applicants under the Act as mineral undertakers has been assessed. Nevertheless as many of these leases may be brought into existence, either voluntarily or as a result of an order of the court, before the development charge can be known,

(1) Town and Country Planning Act, 1947, s. 5, sub-s. 1: "As soon as may be after the appointed day, every local planning authority shall carry out a survey of their area, and shall, not later than three years after the appointed day, or within such extended period as the Minister may in any particular case allow, submit to the

" Minister a report of the survey
" together with a plan (herein-
" after called a 'development
" 'plan') indicating the manner
" in which they propose that
" land in that area should be
" used (whether by the carrying
" out thereon of development or
" otherwise) and the stages by
" which any such development
" should be carried out."

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it would clearly be desirable that the gap in s. 81 of the Act, to which I have referred, should be filled by further legislation.

The whole matter has to some extent an atmosphere of unreality. The effect of the expropriation of the minerals under his land is that the respondent Dunkerley has nothing but a bare legal interest and no beneficial interest in them. His beneficial interest, for what it may be worth, has been converted into a claim to share in the 300,000,000*l.* fund. It is conceded that, assuming the full operation of the Town and Country Planning Act, 1947, he would be entitled to some royalty, though not to one at more than a nominal rate. On the other hand, assuming that the Iron and Steel Act, 1949, comes into operation, the undertaking of the applicants will be expropriated. On this basis the amount of the royalty can be of no interest to them. Nevertheless, as I see it, the duty which is laid on me is to bring into existence a lease between the respondent Dunkerley as lessor and the applicants as lessees, authorizing the applicants to win by surface mining operations the iron ore and other minerals mentioned in the summons under the land in question, the lease containing provisions usual in mining leases in the district existing before July 1, 1948, and containing provisions as to surface rent, royalty and restoration and other payments which would represent in a lease granted before the above date a consideration fair and reasonable as between a willing grantor and a willing grantee.

As I have said, substantially nothing turns on the provisions of the lease other than the clauses concerned with the scales of the royalty and restoration payments. In order to fix those scales I have to turn again to the Mines (Working Facilities and Support) Act, 1923, s. 9, and my first task is to construe the phrase "on the basis of what would be fair "between a willing grantor and a willing grantee." Two views have been put forward. On behalf of the respondent Dunkerley it is said that the sub-section presupposes complete freedom of negotiation between the parties, in which event it is proper to take into account the favourable circumstances to which I have already referred, in which the applicants are placed in regard to mining operations on this land, and thus justify the scale of royalty payments in the draft lease, even assuming that they are higher than those prevailing in the district before July 1, 1948.

On the other hand, it is submitted by the applicants for

the consideration of the court that in assessing compensation or consideration under s. 9 of the Mines (Working Facilities and Support) Act, 1923, the court should apply the principles thus enunciated by Eve J. in *South Eastern Ry. Co. v. London County Council* (1): "In answering such inquiry the following propositions may, I think, be treated as established by authorities binding on this court: (1.) The value to be ascertained is the value to the vendor, not its value to the purchaser; (2.) in fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3.) market price is not a conclusive test of real value; (4.) increase in value consequent on the execution of the undertaking for or in connexion with which the purchase is made must be disregarded; (5.) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use of it by the vendor; and (6.) the true contractual relation of the parties—that of purchaser and vendor—is not to be obscured by endeavouring to construe it as another contractual relation altogether—that of indemnifier and indemnified."

In *In re Lucas and Chesterfield Gas and Water Board* (2), Fletcher Moulton L.J. said: "No better example of the problem could be found than that which we have in the present case. The land in question is by its position and conformation marked out as a favourable site for an impounding reservoir to collect water for the public supply of a district. The peculiarities which make it suitable for that purpose add nothing to its value as agricultural or grazing land, which I will assume to be the only alternative uses. A public authority obtains powers to take it for a reservoir; ought it to pay any higher price than is represented by its agricultural or grazing value? Is not any price in excess of this a violation of the canon that you are only to give that which represents its worth to the seller, and that you are to disregard all questions of its worth to the buyer? The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration

(1) [1915] 2 Ch. 252, 258. (2) [1909] 1 K. B. 16, 30.

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" in fixing the price, because to do otherwise would be to allow
" the existence of the scheme to enhance the value of the lands
" to be purchased under it. But when the special value
" exists also for other possible purchasers, so that there is,
" so to speak, a market, real though limited, in which that
" special value goes towards fixing the market price, the
" owner is entitled to have this element of value taken into
" consideration, just as he would be entitled to have the
" fertility or the aspect of a piece of land capable of being
" used for agricultural purposes."

In *Corrie v. MacDermott* (1), Lord Dunedin said: " Their
" Lordships cannot accede to this view, and they agree
" particularly with the reasoning of Isaacs J. on this part
" of the case. In their opinion it puts upon the word ' value '
" an amplification of the bare word, treating it as if it was
" ' unrestricted value,' which it will not bear. And, further,
" the law of compensation being as they have stated it,
" namely, the value to the owner as he holds, which law
" has been so often laid down that it must be held to have been
" known to the contracting parties, it was, their Lordships
" think, incumbent on a party who wanted the valuation
" to proceed upon another footing to take care that the words
" used clearly so expressed it."

The first two cases arose under the Lands Clauses Consolidation Act, 1845, s. 63, which reads as follows: " In
" estimating the purchase money or compensation to be paid
" by the promoters of the undertaking, in any of the cases
" aforesaid, regard shall be had by the justices, arbitrators,
" or surveyors, as the case may be, not only to the value of
" the land to be purchased or taken by the promoters of the
" undertaking, but also to the damage, if any, to be sustained
" by the owner of the lands by reason of the severing of the
" lands taken from the other lands of such owner, or otherwise
" injuriously affecting such other lands by the exercise of
" the powers of this or the special Act, or any Act incorporated
" therewith."

Judicial interpretation of that section has given rise to the principles enunciated by Eve J., which I have read, including the principle that the value to be ascertained is the value to the vendor not to the purchaser. I pass over the Acquisition of Land (Assessment of Compensation) Act, 1919, which gave statutory force to the views of Fletcher

Moulton L.J. as to special adaptability, but which, in my view, does not apply to this case ; and I come back to s. 9 of the Mines (Working Facilities and Support) Act, 1923. It is true that the words in this section are " on the basis of what would " be fair and reasonable between a willing grantor and a " willing grantee," which are to be compared with the words " the value of the land to be purchased " in s. 63 of the Lands Clauses Act, 1845 ; but it is to be observed that the words in s. 63 of the latter Act " In estimating the purchase money " or compensation " compare with the words " the compensation or consideration " in s. 9 of the former Act.

As Eve J. pointed out in *In re South Eastern Ry. Co. and London County Council's Contract* (1), the adoption in compensation cases of any other principles than those enunciated by him would lead to startling results, the most obvious one being that it would upset all uniformity of value. Further, as Fletcher Moulton L.J. pointed out in *In re Lucas and Chesterfield Gas and Water Board* (2), it would offend against the principle that a man cannot give more than he has. There is no authority interpreting the effect of the phrase in s. 9 of the Mines (Working Facilities and Support) Act, 1923, which I am considering which directly binds me, but in my opinion the same principles which have been applied in the application of s. 63 of the Lands Clauses Act, 1845, ought to be applied to cases under s. 9 of the Act of 1923, which in my view, on its true construction, is a section directing the assessment of compensation and therefore designed to give to a man the fair value to him of what is being taken from him.

[His Lordship then considered the evidence, accepted that given on behalf of the applicants, and continued :] The scale of royalty payments which the applicant's expert witness gives is fair and reasonable in the circumstances and should be inserted in the form of lease in place of the scale of royalty payments specified in the draft lease.

His Lordship then dealt with the question raised by the East Midland Electricity Board and made an order incorporating the draft lease submitted by the applicants, the payments reserved being amended in accordance with the principles above stated.

Solicitors : *Kingsford, Dorman & Co. ; Ryder, Heath & Co. ; Sharpe, Pritchard & Co. ; E. F. Turner & Sons.*

(1) [1915] 2 Ch. 252.

(2) [1909] 1 K. B. 16.

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Feb. 14.

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Evershed M.R.
Somervell and
Jenkins L.JJ.

*Administration—Lunacy—Intestacy—Devolution—“ Beneficial interest
“ in real estate ”—Administration of Estates Act, 1925 (15 Geo. 5, c. 23)
s. 51, sub-s. 2.*

A testator died on July 12, 1855, having devised freeholds on trust for his son for life and after his death on trust, in default (which happened) of appointment, for such of the son's children as should attain the age of 21 (or being females attain 21 or marry) equally. The son died on November 30, 1906, leaving five children, who had then all attained the age of 21. In 1912 one of these children, a daughter, became of unsound mind. A receiver was appointed on July 22, 1935, and he had not been discharged when she died on September 2, 1948, intestate and a spinster. On March 19, 1949, letters of administration were granted to her brother and her nephew, who was also her heir-at-law under the law of inheritance in force before the Administration of Estates Act, 1925.

A summons was taken out by the deceased's brother to have determined whether her interest in the property devised by her grandfather, the testator, was or was not at the time of her death a beneficial interest in real estate within the meaning of s. 51, sub-s. 2, of the Administration of Estates Act, 1925. That all other conditions in that subsection were fulfilled was not disputed.

Held, by Evershed M.R. and Somervell L.J., Jenkins L.J. dissenting, that the beneficial interest of a lunatic dying intestate in an undivided share of real estate is covered by and will devolve as provided by s. 55, sub-s. 2 of the Administration of Estates Act, 1925, if (a) it would have devolved as real property in accordance with the law as it stood immediately before the Real Property Legislation of 1925; (b) that interest had come into existence and devolved upon the deceased lunatic before that legislation had come into operation; and (c) still subsisted at the time of the death of the lunatic. Accordingly, the undivided interest of the deceased in so much of the freehold estate devised by her grandfather as remained unsold at her death devolved upon her heir-at-law as determined by the law of inheritance in force immediately before January 1, 1926.

In re Donkin [1948] Ch. 74, was rightly decided but distinguishable on the ground that in that case the interest in question had devolved on the deceased lunatic after December 31, 1925.

Per Jenkins L.J. dissenting, that the material date at which to determine, for the purpose of devolution, the nature of the property

[Reported by JOHN A. GRIFFITHS, Esq., Barrister-at-law]

of a lunatic dying intestate was the date of that person's death and no other. Accordingly as at the date of the deceased's death her beneficial interest in the undivided share of the real estate devised by her grandfather had, by the Law of Property Act, 1925, been converted into personalty, it did not devolve as real estate would have devolved before 1926.

Decision of Danckwerts J., ante 78, reversed.

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APPEAL from Danckwerts J. (1).

Constance Mary Bradshaw was the daughter of Thomas Bradshaw, who died on November 30, 1906, and the granddaughter of William Bradshaw, who died on July 12, 1855. By his will dated January 22, 1853, William Bradshaw devised certain freehold estates on trust for his son, Thomas Bradshaw, for life, and after his death, in default (which happened) of appointment by Thomas Bradshaw, on trust for such of Thomas Bradshaw's children as should attain the age of 21 or, being female, attain that age or marry, equally. Thomas Bradshaw left five children, who had then all attained the age of 21: (1.) Thomas Clarence Bradshaw, who died on June 6, 1946, leaving issue, the appellant, Hengist Richard Edward Bradshaw; (2.) Percival Edward Bradshaw, who died on February 16, 1941, without issue; (3.) the respondent Alfred Ernest Bradshaw; (4.) Constance Mary Bradshaw; (5.) John Horsley Bradshaw, who died on July 15, 1927, leaving issue, the respondent, John S. Bradshaw.

In 1912 Constance Mary Bradshaw became of unsound mind. A receiver was appointed on July 22, 1935, and he had not been discharged when she died on September 2, 1948, intestate and a spinster. On March 19, 1949, letters of administration of her estate were granted to her brother, the respondent Alfred Ernest Bradshaw, and her nephew, Hengist Richard Edward Bradshaw, who was also her heir at-law under the law of inheritance in force before the coming into force of the Administration of Estates Act, 1925.

A summons was taken out by Alfred Ernest Bradshaw to have determined whether the interest of Constance Mary Bradshaw in the freeholds devised by her grandfather, some of which remained unsold, was or was not, at the time of her death, a beneficial interest in real estate within the meaning

(1) Ante 78.

C. A. of s. 51, sub-s. 2 of the Administration of Estates Act, 1925 (1)
 1950 It was not disputed that the other conditions in that sub-
 section were fulfilled.

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Danckwerts J. held (2), applying *In re Donkin* (3) that the interest to which the deceased granddaughter was entitled at her death was not a beneficial interest in real estate within the meaning of s. 51, sub-s. 2, of the Administration of Estates Act, 1925. He was reluctantly driven to that conclusion that her interest was not excepted by the sub-section from the provisions of part IV of the Act, although that interpretation of the sub-section defeated what was in his view its probable intention, namely, to preserve to the heir-at-law his expected interest in the property under the old law. The heir-at-law appealed.

N. S. S. Warren for the respondent, Alfred Ernest Bradshaw.

A. H. Droop for the heir-at-law of the intestate. The interest which the intestate had at the time of her death in the freeholds devised by her grandfather was a "beneficial interest" in real estate within the meaning of s. 51, sub-s. 2 of the Administration of Estates Act, 1925. The object of that sub-section is to preserve to the heirs of persons of unsound mind who were incapable of making valid wills the expectations in realty which those heirs had under the law of inheritance in force before the Act was passed. That object is achieved where the intestate was at his death entitled to an entirety; and it must have been intended that the provision should also

(1) Administration of Estates Act, 1925, s. 51, sub-s. 2: "The foregoing provisions of this Part [IV] of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death)

"shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act, applicable to freehold land, and that law shall notwithstanding any repeal apply to the case. For the purposes of this sub-section, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged."

(2) Ante 78.

(3) [1948] Ch. 74.

apply where he was at his death entitled to an undivided share, for, before the passing of the Act, there was no difference between the devolution on intestacy of entireties and of undivided shares. If, therefore, the subsection does not apply to undivided shares, its object has to that extent been defeated by defective drafting.

"Real estate," in s. 51, sub-s. 2, means in effect hereditaments which under the pre-1926 law of inheritance would have descended to the heir on an intestacy. In s. 45, "real estate" is used in this sense of "hereditament" and, it is evidently used in the same sense in s. 51, sub-s. 2. The definition of "real estate" in s. 55 does not apply. Section 51, sub-s. 2 does not require that the beneficial interest at the time of his death should itself be "real estate." *In re Mellish* noted in *In re Wheeler* (1) which was approved in *In re Kempthorne* (2) and *In re Fuller's Contract* (3) may be referred to as showing that the interest of the intestate could properly be described as an interest in real estate in spite of the statutory conversion. The ground of decision in *In re Donkin* (4) is inconsistent with the foregoing argument though that decision could be supported on other grounds.

T. K. Wigan for one of the next-of-kin of the intestate. The interest of the intestate had become personalty at the date of her death and was not a beneficial interest in real estate for the purposes of s. 51, sub-s. 2. The land might have been sold at any time after 1926; and if it had been the intestate's share would have been paid to her receiver as money and at her death s. 51, sub-s. 2 clearly could not have applied. It would be a capricious result if the devolution of a lunatic intestate's undivided share in realty were to depend upon the accident of whether the trust for sale had been carried out before the death or not.

An undivided share is not an interest in real estate. It is true that persons interested in land subject to a trust for sale have an interest in land, but they have only the right to receive the rents and profits until sale, and their substantive interest is in the proceeds of sale. These are clearly personalty. *In re Donkin* (4) is relied on. The definition of real estate in s. 55 is material. That definition applies to Part IV just as much as to any other part of the Act except "as otherwise provided." The definition in s. 55 leads back to s. 3, which

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(1) [1929] 2 K. B. 81, 82.

(3) [1933] Ch. 652, 656.

(2) [1930] 1 Ch. 268, 293.

(4) [1948] Ch. 74.

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defines "real estate" as including chattels real but excluding money arising under a trust for sale. As for s. 51, sub-s. 2, this definition cannot be applied in its entirety because s. 51, sub-s. 2 (which is in Part IV) expressly excludes chattels real. That is why the words "save as provided in Part IV" are necessary in s. 55. But the rest of the definition applies, including the part which excludes the proceeds of sale of land held on trust for sale. Consequently a beneficial interest in the proceeds of a trust for sale is not within s. 51, sub-s. 2.

The policy of the Act is not to preserve all expectant interests in the estate of lunatics because they are unable to make valid wills. The devolution of personal estate is unaffected but the Act has expressly excepted interests in real estate. In any case the general policy of the Act does not give any assistance in deciding whether an interest is or is not an interest in real estate.

EVERSHED M.R. The question which we have to determine in this appeal, one of the many problems, now happily diminishing, which have arisen out of the effect and construction of the real property legislation of 1925, relates to the application to the facts of the case of s. 51, sub-s. 2 of the Administration of Estates Act, 1925. It is a difficult and somewhat complex problem. As I read the judgment of Danckwerts J., he would, for himself, have inclined in another direction, if he had not conceived himself bound by a decision of Roxburgh J. The question may, therefore, be said to have given rise already to some divergence of judicial opinion, and I am sorry to say that that divergence persists in this court. The view which I am about to express, therefore, I express with diffidence.

The facts, so far as relevant, can be briefly stated. A Miss Bradshaw died intestate on September 2, 1948. At the date of her death she was within the meaning of the words as used in s. 51, of the Act of 1925, a lunatic having no testamentary capacity, and she had been such consistently since the Act came into force on January 1, 1926. Her property at the date of her death included what would have been (but for the Act), an undivided share in certain freehold property which came to her through her father from her grandfather. It is conceded on all hands that, as a result of the real property legislation of 1925, her interest, that is to say her beneficial interest, in the property was a personalty interest at her death. The

grandfather had died many years ago, and the father died in 1906. It was equally beyond question that, at the father's death, the interest was an interest which all conveyancers and lawyers would have regarded as a species of real property, namely, an undivided fifth share in freehold land. But, as I have said, as a result of the converting process of the Act of 1925, the beneficial interest of the intestate in the property became on January 1, 1926, a one-fifth undivided share in the proceeds of sale of the self-same property which was thereafter held by the trustees of the grandfather's will on the statutory trusts.

[His Lordship then read s. 51, sub-s. 2, of the Administration of Estates Act, 1925, and continued :] The question is this : At the date of her death, was the intestate's undivided share in the proceeds of sale of her grandfather's freeholds a "beneficial interest in real estate" within the meaning of that sub-section which, by the terms of the sub-section, devolved in accordance with the general law in force before the coming into force of the Act of 1925 ? If yes, then the appellant, the first defendant in the action, is entitled to the property. If no, then it is divided in accordance with the general scheme of distribution of estates under the Act of 1925, and the appellant shares the property equally with the plaintiff and the second defendant.

The sub-section is couched in somewhat complex terms. The opening words : "The foregoing provisions of this part "of this Act," is a reference to part IV of the Act, which part is exclusively concerned with the distribution of the residuary estate of deceased persons. In other words, Part IV provides for the distribution, among the persons entitled, of the property of which a deceased person was entitled to dispose as his own beneficial property.

In approaching the problem, I venture to think that the framers of the legislation of 1925 have made the task of the court more difficult by the somewhat oblique method by which, if at all, they have introduced into the sub-section the definition provisions relative to the term "real estate." As this matter is not without significance, I will now consider it. In s. 55 of the Act (in Part V), are a number of definition paragraphs, of which No. XIX is as follows : "'Real estate' save as "provided in Part IV"—that is the Part comprising s. 51—"of this Act means real estate, including chattels real, which "by virtue of Part I of this Act devolves on the personal

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“representative of a deceased person.” It is clear that that paragraph, though it may not strictly be called a definition so much as, perhaps, an exposition of the phrase, does not in terms wholly exclude its application to Part IV. It is only saying, as I read it, that, except as otherwise provided for in Part IV, it shall apply to that Part. The difficulties are not yet over, for s. 3, in Part I of the Act contains a definition of “real estate,” but this definition is in terms only to apply in that Part of the Act. Section 3, sub-s. 1 states: “In this Part of this Act ‘real estate’ includes (i) chattels real and “land in possession, remainder, or reversion, and every interest “in or over land to which a person was entitled at the time of “his death; and (ii.) real estate held on trust (including “settled land) or by way of mortgage or security, but not “money to arise under a trust for sale of land, nor moneys “secured or charged on land.”

Mr. Wigan has contended that the effect of these definitions is that the phrase “real estate” in s. 51 is to be read as having the meaning assigned to real estate in s. 3, albeit expressed only as applying for the purposes of Part I. Mr. Droop has contended that those definitions really do not apply at all and that (particularly, having regard to the subject-matter with which Part IV is concerned), real estate means real estate in the strict sense which under the common law descended to the heir-at-law. In my opinion it does not matter for the decision of this case which view is taken. I have referred to it because I think that Danckwerts J., as I read his judgment, was disposed to take the view that the language of para. XIX, and particularly the words “save as provided in Part IV,” excluded the definition paragraph from the section altogether. Even, however, if there is read into “real estate,” with the exception of the reference to chattels real, the full definition of s. 3, it does not seem to me that the solution of the problem facing the court is materially advanced. There will at least be included by the terms of the definition real estate held on trust and I do not read that as meaning held on trust by the lunatic exclusively; nor does it seem to me that it is held any less or more “on trust” if it happens to be held on trust for sale.

But whatever definition is given to the phrase “real estate” in s. 51, the vital question in the case is whether the somewhat larger phrase “any beneficial interest in real estate” covers this particular subject-matter. As I have already stated, the

judge seems to me to have indicated that his own view, unshackled by authority, would have favoured Mr. Droop's contention. If I read his judgment correctly, he thought that *prima facie* the words in the paragraph applied all the more since there is judicial authority for the view that an interest in the proceeds of sale of real estate may, in an appropriate context, properly be described as an interest, or a beneficial interest, in real estate. He did not think that he was prevented from coming to such a conclusion by the terms of the above-mentioned definition, but he thought himself bound by the decision of Roxburgh J. in *In re Donkin* (1).

I shall best formulate the points which have been taken, and the answers which suggest themselves to my mind, if I now refer to that case. It was not parallel to the present case on its facts, for there the lunatic, who had been such since before January 1, 1926—in that respect it was like the present case—succeeded, in the interval between January 1, 1926, and her own death in 1934, to an interest which descended to her from her brother, of whom she was the sole next of kin. The brother's estate consisted in part of freehold houses. As a result of the operation of the legislation of 1925, that property had to be administered in accordance with the Administration of Estates Act, 1925. Those provisions (I refer to s. 33) require that the property should first be sold and then the proceeds applied in the payment of debts, costs and testamentary expenses and thereafter handed over to the persons beneficially interested : so that, passing for the moment over s. 51 and any effect which it may have, the interest to which the lunatic became entitled on her brother's death in 1928 was, among other things, the balance of the proceeds of sale of her brother's freeholds, after the primary trust for conversion and payment of debts had been carried into effect. Therefore, the question which Roxburgh J. had to decide was whether s. 51 applied to a beneficial interest of that character, derived though it was from freehold property, which came to her after the operation on that property of s. 33 of the Administration of Estates Act and which, so far as she was concerned, came into existence for the first time after all these Acts had come into force. It will, therefore be seen that on their facts there is this vital distinction between *In re Donkin* (1) and the present case. In the present case the lunatic's interest, whatever its quality, real or personal, existed on

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The point is one of great importance, because on one view of the reading of the relevant sub-section, it might be said that the devolution, according to the old law, would be preserved in the case of any beneficial interest in real estate to which a lunatic succeeded, however long after the converting operations of the Act of 1925 had come into operation, so long, of course, as the lunatic remained a lunatic till her death and had continuously been so since 1925. To take an illustration, it would be possible that a lunatic in the year 1975, having been a lunatic all her life and before 1925, then acquired by gift or succession an absolute interest in freehold property. In those circumstances, it might be said that on her death that freehold property, unlike any other freehold property, would go to the heir-at-law of the lunatic at her death: that is to the person who, under the old law, would have answered that description.

So far as *In re Donkin* (1) is concerned, Roxburgh J.'s decision, faced as he was with that possibility, turns on one phrase. He said (2), after reading s. 51, sub-s. 2, "It seems to me that in order to make sense of that provision it is necessary to confine the beneficial interest indicated in the opening words of sub-s. 2 to such interests as would, in accordance with the general law in force before the commencement of the Act, have devolved in accordance with the law applicable to freehold land." That phrase, which is the turning point in the judgment, is, I think, capable of two constructions: It might mean that the phrase "beneficial interest" is confined to such an interest as existed at the commencement of the Act and would then have devolved as freehold land. Or it might mean a beneficial interest which, whenever it came into the lunatic's possession, would, if it had not been for the Act, have devolved to the heir-at-law. If the judge had meant the former, I should have agreed with him, and I think Danckwerts J. would also have agreed with him. But in my opinion Roxburgh J. undoubtedly used the phrase in the latter sense, and, so used, it seems to me, though it is sufficient to decide *In re Donkin* (1) it would leave open the question whether the property to which the lunatic in the present case succeeded and which at that time was undoubtedly

(1) [1948] Ch. 74.

(2) Ibid. 78.

real estate, would devolve on the heir. I think that *In re Donkin* (1) was correctly decided, but I venture to base my reason for so deciding on grounds somewhat different from those which Roxburgh J., if I rightly understood him, expressed. The grounds on which I would decide *In re Donkin* (2) would not have obliged Danckwerts J., to decide the present case as he did, and indeed I think that this case ought to be decided as Danckwerts J., if left to himself, would have decided it.

In my judgment, the clue to the matter is this: I think that beneficial interests in real estate (within the meaning of s. 51, sub-s. 2, of the Administration of Estates Act, 1925), must possess at least these two characteristics: they must exist or have existed and belonged to the lunatic on January 1, 1926; they must also exist and belong to the lunatic at the time of the lunatic's death. If that is right, then *In re Donkin* (1) is excluded from further consideration for the first characteristic in that case was absent. But I think also that the beneficial interests must thirdly be such that at the date of the coming into operation of the Act, or immediately before the coming into operation of the Act, they would have devolved as real property and gone to the heir. I will state in a moment my reasons for that view, but, subject to those limiting characteristics, I think that the phrase "any beneficial interest" "in real estate" is one of wide import and does (because it is not in terms or by necessary implication excluded from so doing), according to the ordinary usage of language, cover an interest such as this lunatic had, namely, an interest in the proceeds of sale of real estate held on trust for sale. If that is right, the necessary conclusion follows.

I will give my reasons for saying that these beneficial interests whatever they are, must have the characteristics which I have ascribed to them. Section 51, sub-s. 2 provides that the beneficial interest concerned must be one "to which" "a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, "to make a will," etc. That seems to me to be quite clear. The beneficial interest therefore must, I think, be one in reference to which, at the date of the coming into force of the Act, the lunatic was "unable to make a will"; in other words, it must have existed and belonged to the lunatic at that date. I reach that conclusion because the section goes on, "who thereafter dies intestate in respect

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(2) *Ibid.*

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" of such interest without having recovered his testamentary " capacity," and there is a further reference to any will " in " respect thereof " which the lunatic had made before his or her insanity, which ex concessis must have started before December 31, 1925. Secondly, there can be no doubt that the beneficial interest must continue until the date of the lunatic's death, for in terms the section says " to which " the lunatic " was entitled at his death." Finally, in the last part of this sub-section come the words " and any such beneficial interest " shall devolve in accordance with the general law in force " before the commencement of this Act applicable to freehold " land, and that law shall, notwithstanding any repeal, apply " to the case." That seems to me to indicate in the plainest terms that this beneficial interest is one in respect of which the law of descent applicable would, apart from the repeal section, have been the old law as to real estate. Therefore, I feel compelled, as a matter of construction of the sub-section, to say that a beneficial interest referred to must have the three characteristics which I have stated. So long as it has them, I see no reason for limiting the natural and, as I think, wide usage of the phrase " any beneficial interest in real " estate." My view above referred to is reinforced, I think, for a reason indicated during the argument by my brother Somervell, namely, the use before the word " entitled " of the past " was " rather than " is."

There has been considerable argument what that phrase " any beneficial interest in real estate " properly describes, but it cannot be doubted, I think, that at least in some contexts a share in the proceeds of sale of realty would be covered by it. For other purposes, no doubt, it is equally true that interests in the proceeds of real estate are personalty. Thus, Clauson J., in *In re Price* (1), describes them as an interest in personalty. But, as Mr. Droop pointed out, that judge's mind was not directed in the least to the particular question with which we are concerned. What he was concerned to point out was, to use his own language (2), that the trust for sale had converted, " so far as beneficiaries are concerned," their interests from a landed or real interest into a personalty interest. Indeed, so far as authority is concerned, if authority be necessary, it seems to me that Danckwerts J., rightly derived support from, among other things, the language of Russell L.J., in *In re Kempthorne* (3).

(1) [1928] Ch. 579.

(3) [1930] 1 Ch. 268.

(2) *Ibid.* 579, 589.

In re Warren (1), which came after *In re Kempthorne* (2), raised the question whether a particular gift was adeemed and that, no doubt, depended primarily on the language of the will in suit. But, in the course of his judgment, Maugham J. said (3): "In considering that question it is important to note that the legislature has not deprived the testatrix of all interest in the land. The 'statutory trusts' (the meaning of which expression is set out in s. 35 of the Law of Property Act, 1925) are shortly to sell and hold the net proceeds on such trusts as may be requisite for giving effect to the rights of the persons interested in the land." That is a reference to s. 26 of the Law of Property Act, 1925, after quoting which the judge observed (4): "But in substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act." The judge then referred to *In re Kempthorne* (2), where Russell L.J. said (5): "And, therefore, it was contended that his property continued to be freehold property, and had not been changed into personal estate"—that was a case of undivided shares—"I am unable to accept that view. There is no doubt that he is interested in the land; but his interest has ceased to be freehold property, and has become personal estate. To borrow an old phrase, frequently used in another connexion, his interest, though an interest which savours of realty, is none the less personal estate."

I have cited those observations to support the view that, as a matter of ordinary English, the formula "any beneficial interest in real estate" can quite properly, and without abusing language or using it loosely or imprecisely, cover a share in the proceeds of sale of real property. It is true that in the passages quoted the word "land" is used rather than "real estate," but I cannot think that that vitally affects the matter.

Mr. Wigan was asked what were the beneficial interests in real estate which and which alone sub-s. 2 of s. 51 was designed to cover. It would be most unjust to him to suppose that his reply was exhaustive, but he did give examples which

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(1) [1932] 1 Ch. 42.

(4) *Ibid.* 47.

(2) [1930] 1 Ch. 268.

(5) [1930] 1 Ch. 292.

(3) [1932] 1 Ch. 42, 46.

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no doubt were present to his mind after giving much thought to the problem. He said, "Land in fee simple : interests in " remainder : estates pur autre vie : and absolute equitable " interests." He was then asked if the words " any beneficial " interest in " were omitted from the formula which of those interests would no longer be covered, to which subject to one qualification he answered, None. He expressed a doubt whether absolute equitable interests would be covered in either event, but, if they were covered in the one case, I did not understand Mr. Wigan to say that they would not be covered in the other. However that may be, I think it became apparent in the course of the argument that those words, " any beneficial interest in " must either be given the kind of significance which I have given them or should be treated as put in *ex abundanti cautela* to exclude the application of this sub-section, in effect, to real estate held by the lunatic as trustee. I find the suggestion that holdings as trustee could ever have been in contemplation at all in this section and in this Part of the Act extremely difficult to accept. The whole of this Part of the Act concerns and concerns only the distribution of the beneficial interests of a deceased person. I cannot think that anybody could have contemplated or thought that special words were required to procure that this sub-section should not be applicable to cases where lunatics were sole trustees.

Therefore, in its context (though I appreciate the force of the view which may be taken on the other side), I feel compelled to the view that " any beneficial interest in real estate " is a phrase which is naturally, and is in fact, used in this context to cover such an interest as that with which we are here concerned. The word " beneficial " is no doubt a limitation of the word " interest." None the less, in my judgment, the addition of the whole phrase " beneficial interest in " to " real estate " expands and enlarges the subject matter to which the sub-section would otherwise have been related and makes its language apply to a species of property which, being a beneficial interest in realty in 1925, still continued thereafter to retain that quality.

I think the result is a natural result, for after all this section is, on the face of it, a saving section. It seems to me to be naturally designed to preserve the rights of those who would be dispossessed, so to speak, by the coming into operation of the Acts in circumstances in which such dispossession could

not have been prevented by the deceased owing to his or her lunacy. And I think it natural in such circumstances that such well-recognized real property interests under the old law as undivided shares in real property should not be treated differently from other real estate interests.

My conclusion, for the reasons I have already stated, does not involve the view that interests coming into existence for the first time quoad the lunatic after the Acts have come into force and converted as a result of the legislation into personalty, would be diverted from the ordinary rules of distribution provided by the Act.

Moreover (and this is the point with which I end this judgment) my conclusion does not involve that if, apart altogether from the Act, real property had, before the Act came into force, been subjected to a trust for sale, the interest of the lunatic in the proceeds of that sale would descend as realty under the old law. I say that for the short and simple reason, that that beneficial interest in real estate would not have been a beneficial interest in real estate which, at the material date—namely, the coming into operation of the Act—would have devolved as the real estate of the lunatic under the old law.

My conclusion is the result of the three characteristics which I find attributable to the beneficial interest covered by the sub-section. I agree with Mr. Wigan that it means putting some gloss on, or explanatory language into, the sub-section. So that I may not be thought to be evading that consequence, I will state what seems to me one way, at any rate, of reading the sub-section, adding the words which I think must necessarily be added. I would read it thus: "The foregoing provisions of this Part of this Act do not apply to any beneficial interest to which a lunatic or defective living and of full age was entitled as real estate (but not including chattels real), at the commencement of this Act," etc. I think that reading is necessarily involved in the language.

I have stated the matter at some length out of respect for the argument and for the views of Roxburgh J. and Danckwerts J., and certainly not least, because of my awareness of the contrary view to which Jenkins L.J. is inclined; but for the reasons stated, I would allow the appeal.

SOMERVELL L.J. I agree. The first question which I think

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has to be considered is whether s. 51, sub-s. 2 of the Administration of Estates Act, 1925, is confined to cases where a beneficial interest existed in the lunatic at the commencement of the Act. I have come to the conclusion that that is a necessary condition of the application of the sub-section. The actual words used in the sub-section are capable of either construction, but I think, whichever of the two constructions is put on them, it might be said that the language is not so completely clear or as apt as perhaps it might have been. But I come to that conclusion for these reasons. I think that the opening words plainly point to this construction. The fact that the person entitled must be a lunatic of full age at the commencement of the Act naturally, though not perhaps necessarily, indicates that it is to that date that reference is made in order to see whether he has any beneficial interest in real estate in respect of which he was not able to make a will. The later words "was entitled at his death" naturally have to be inserted, because there must be two conditions if the *prima facie* view which I have expressed about the commencement of the Act is right. Obviously, the section must not operate, or purport to operate, unless the interest still subsists at his death. I therefore come to that conclusion for the reasons which I have shortly expressed and for the reasons given by the Master of the Rolls.

On the question whether this undivided share in realty, the nature of which was changed by this body of legislation including the Law of Property Act, 1925, is within these words, I associate myself, with respect, with what the Master of the Rolls has said as to the construction of these words in this context. But, having come to the conclusion that the beneficial interest in real estate must exist at the commencement of the Act, I think that, if left to myself, I would have arrived at the same result by a somewhat shorter route, because, on this view, it seems to me natural to construe the words in the light of their meaning immediately before the commencement of the Act. Nobody disputes that, until the Law of Property Act, 1925, operated on interests such as those that we are considering, they were beneficial interests in real estate. I think that that construction is reinforced by the logic and purport of this sub-section. I can see no reason why the sub-section should make a saving in respect of interests in real estate, which are left as such as the result of the Law of Property Act, but not make a saving in respect of interests in real estate the nature

of which was changed, for certain purposes at any rate, by that Act. If, therefore, these words be construed in that way, that illogicality does not arise. I agree that the appeal should be allowed.

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JENKINS L.J. I regret that I find myself unable to agree with my Lords as to the right conclusion in this case. The Law of Property Act, 1925, by s. 39 and Part IV of sch. I, subjected to a statutory trust for sale land held at the commencement of the Act in undivided shares. Statutory trusts were defined by s. 35 of the Act. Very briefly, they were a trust for sale with power to postpone the sale “ and to stand “ possessed of the net proceeds of sale . . . and of the net “ rents and profits until sale ” on the trusts requisite for giving effect to the rights of the persons interested in the land. It is not open to doubt that the statutory trust for sale thus imposed was just as effective as an express trust for sale created by a disposition for the purpose of effecting an immediate conversion of the land in equity from realty to personalty. It follows that every former owner of an undivided share in land which, as the law stood before 1926, was real estate received, in lieu of that interest in realty, an interest in personalty consisting of a share in the proceeds of sale to arise from the execution of the statutory trust for sale and a share also in the rents and profits until sale. That substituted interest, I apprehend, was quite clearly personalty for all purposes, including devolution on intestacy, and incidentally also including the construction of gifts by will in the sense that a general testamentary gift of real estate in the absence of some special context would no longer include such undivided share.

It was open to the legislature, if minded so to do, to insert in the Law of Property Act, 1925, a saving to the effect that the conversion effected by the statutory trusts should not alter the character or quality of any interest in an undivided share to which a lunatic or defective might have been entitled before the commencement of the Act. No such saving was inserted, and the undivided share of a lunatic or defective suffered the same fate as the share of any person who was fully compos mentis. Had the legislation rested there, the result, as regards devolution, would have been plain. By force of the conversion, a former undivided share, or rather a share in the proceeds of sale corresponding to the former undivided share, whether of a lunatic or a defective, or a person of sound mind,

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instead of passing to the heir, would have passed to the persons entitled to his personal estate under the Statutes of Distribution in force before the Law of Property Act, 1925. But, in fact, in addition to the Law of Property Act and the other Acts passed at the same time, there was passed the Administration of Estates Act, 1925, which altered the devolution of property on an intestacy.

Broadly speaking, the effect of that Act (the Part of which chiefly material for the purposes of this case is Part IV) was to abolish all the rules of descent specially applicable to realty and to assimilate the devolution of realty to that of personalty. The devolution of personalty, or, rather, of property generally, irrespective of whether it was realty or personalty, reproduced in a somewhat modified form the main provisions governing intestate succession to personalty as they stood before the Act. I say in a somewhat modified form because there were various modifications of more or less importance. But the change as regards personalty was not nearly so radical as the change involved in abolishing the old rules of descent to the heir. As I have said, there is no saving clause in the Law of Property Act, 1925, in relation to undivided shares held by lunatics or defectives. But it was thought necessary in the Administration of Estates Act, 1925, to insert a saving clause as regards the application of the new rules of succession to the real estate of such persons. Apparently, the framers of the Act considered that the alterations, so far as they affected personalty, were of a kind to which no one would be likely to raise any strong objection. Therefore, the personalty of a lunatic was left to descend after the Act in the same way as the personalty of a person of sound mind. But with respect to real estate a saving was thought to be necessary, and provided for by s. 51, sub-s. 2. [His Lordship read it.]

The question in the case is whether, by virtue of that saving provision, the intestate's share in the proceeds of sale, and net rents and profits until sale of the property, to an undivided share in which she was entitled immediately before the coming into force of the legislation of 1925, devolved as real estate. As to that, I would first observe that, as appears from what I have already said, the conversion of this undivided share into personalty was effected not by Part IV of the Administration of Estates Act, 1925, at all, but by the Law of Property Act, 1925. A section which purports to be a saving from the application of "the

"foregoing provisions" of Part IV of the Administration of Estates Act, 1925, is *prima facie*, not an appropriate vehicle for the saving of an undivided share of an intestate from the results of the conversion effected by a wholly different Act. One would expect the saving in s. 51, sub-s. 2 of the Administration of Estates Act, 1925, to be concerned simply with the innovations in the way of rules as to devolution of property on intestacy effected by that Act and nothing else. In my judgment, that is precisely what this sub-section does refer to.

The first question which arises is what is meant by "any beneficial interest in real estate." Does that expression include a share in the proceeds of sale to arise under the statutory trusts for sale? With respect to my Lord, I should say that the answer to that question quite clearly must be in the negative. If an interest in the proceeds of sale to arise under the statutory trusts for sale is a beneficial interest in real estate within the meaning of the section, by parity of reasoning an interest in the proceeds of sale to arise under an express trust for sale would be an interest in real estate. If that were so, one would, on a natural reading of the section, *prima facie*, get the peculiar result that where a lunatic or a defective was entitled to proceeds to arise under an express trust for sale, those proceeds on the death of that person intestate would pass in accordance with the old law applicable to the devolution of freehold land—an extraordinary result indeed!

Mr. Droop appreciated the difficulty about construing "any beneficial interest in real estate" in that way, and he disclaimed the view that a share in the proceeds to arise under an express trust for sale would be affected by the section in the way that I have mentioned. He sought to extricate himself from the difficulty by saying that this sub-section only applied to beneficial interests in real estate to which a lunatic or defective was entitled immediately before the commencement of the Administration of Estates Act, 1925, and which, as the law stood immediately before such commencement, were real estate. I understand that to be in substance the view which has commended itself to my Lords. For my part, and with diffidence, I find it impossible to extract that construction from the language used. It seems to me that the sub-section quite clearly, so far as language can make anything clear, is directed to one point of time and one point of time only,

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and that is the death of the lunatic or the defective. The lunatic or the defective dies after the commencement of the Act without ever having recovered testamentary capacity and one has to consider how his property is to devolve. One finds that his estate includes a share in proceeds to arise under a statutory trust for sale of freeholds. In my judgment, such an interest on the death of the lunatic or defective after the commencement of the Act must necessarily be personal estate and cannot be anything else. I think that result necessarily follows unless one can recast the language in the way my Lord proposes so as to determine the quality of the property immediately before the commencement of the Act instead of at the death of the lunatic or the defective. That is simply a matter of the construction of the language used in the sub-section, which is admittedly highly involved, as the draftsman has thought it necessary to treat himself to at least one relative enclosed within another and has managed to postpone to about the eighth line of the section the vital words "was entitled at his death." But when one reads it through to the end, I think it really quite clear that the only date which can be looked at is the date of the death.

There is very little more that I wish to say. My Lord found it possible, as I understood his reasons, to hold that the word "beneficial" has some enlarging effect on the words "real estate." I find it impossible to agree with that. It seems to me that the word "beneficial" is only inserted to exclude interests which might be held by the lunatic or defective as a trustee. I think exactly the same meaning would have been achieved if the section had run "any interest in real estate" and then had said "to which a lunatic" and so on "was entitled at his death beneficially and not as a trustee." My Lord has suggested that this is not enough to account for the use of the word "beneficial." He pointed out that the cases in which trust interests could come into question would be very rare and in any case no one could suppose that the section was intended to apply to them. That may be so, but I think that in that kind of matter the draftsman of the Act did display a superabundance of caution, for a little later on in the section he found it necessary to exclude interests ceasing on the death of the lunatic or defective. For my part, I find it impossible to see how an interest ceasing on the death of the lunatic or defective could devolve either in accordance with the old law or in accordance with the new law.

Further, as to the meaning of the vexed phrase "any "beneficial interest in real estate," for my part, reading the definition contained in s. 55, sub-s. 1, para. XIX of the Act " 'real estate' save as provided in Part IV of this Act " means real estate, including chattels real, which by virtue " of Part I of this Act devolves on the personal representative " of a deceased person," in conjunction with the definition of real estate which so devolves contained in s. 3, sub-s. 1, I would be disposed to conclude that by definition, that is to say, by the definition extracted from the joint application of s. 55, sub-s. 1, para. XIX and s. 3, sub-s. 1, money to arise under a trust for sale ; or, in other words, an interest under a trust for sale, is excluded from the expression " any beneficial " interest in real estate " in s. 51, sub-s. 2. I do not attach any great importance to that, however, for it seems to me that Roxburgh J. was right in *In re Donkin* (1) when he said in effect that from the context it is apparent that the beneficial interests in real estate referred to are those beneficial interests which would have devolved in accordance with the old law of intestate succession to real estate if that law had not been abrogated by the new legislation.

I think that my Lords in substance are in agreement with that, and the real point of difficulty is simply at what moment of time should the quality of the beneficial interest be determined. For the reasons which I have endeavoured to express, I find myself unable to accept any other moment of time for that purpose than the date of the death of the deceased. If I could agree with my Lords that the moment before the commencement of the Act was the appropriate time, I would agree with them that the consequences which they indicate would follow from that ; but, having regard to the contrary view which I take on that point, I would dismiss the appeal.

Appeal allowed.

Solicitors : *Blyth, Dutton, Wright & Bennett.*

(1) [1948] Ch. 74.

C. A.

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BRADSHAW,
In re.

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[1949. B. 3440.]

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Trade union—Rules—Rules relating to political fund—Validity—Jurisdiction where validity of rules challenged—Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3, sub-s. 1 (b).

The validity of a trade union rule may be challenged in a court of competent jurisdiction, although the rule has been approved by the Registrar of Friendly Societies.

The plaintiff was a non-contributing member to the political fund of a trade union and was in 1948 dismissed from the chairmanship of a branch of the union, on the ground that a member, who had contracted out of contributing to the political fund, was not eligible to serve as a branch officer. He thereupon began an action against the union for certain relief, including a declaration that the rules relating to the application of funds of the union in furtherance of political objects did not comply with s. 3, sub-s. 1 (b) of the Trade Union Act, 1913.

Held, that the rules of the union offended against s. 3, sub-s. 1 (b), of the Act, and that the plaintiff was entitled to the declaration which he sought.

Davie & Co. v. Colinton Friendly Society (1870) 9 Macph. 96, referred to.

WITNESS ACTION.

The plaintiff, Arthur Birch, became in 1936 a member of the National Union of Railwaymen, which was a registered trade union. In December, 1946, he was elected chairman of the Woodford Halse branch of the union and was re-elected chairman in December, 1947.

In February, 1948, a question was raised as to the eligibility of the plaintiff, who had always obtained exemption from the obligation to contribute to the union's political fund, to hold the office of chairman of the branch. The matter was referred to the general secretary of the union for his ruling, and on February 16, 1948, he replied that a member who had "contracted out" of the political fund was not eligible to serve as a branch officer. A protest was sent to the general secretary by the plaintiff, but the general secretary confirmed this ruling on March 12, 1948, and, in view of the ruling, the plaintiff ceased to act as chairman of the branch.

The relevant rule was r. 21 (8) of the rules of the National Union of Railwaymen, which provides: "A member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits

" of the union, or placed in any respect, either directly or
 " indirectly, under any disability or disadvantage as compared
 " with other members of the union by reason of his being so
 " exempt, except that such a member shall take no part in
 " the control or management of the political fund of the
 " union and shall be ineligible to occupy any office or
 " representative position involving any such control or
 " management."

The plaintiff complained to the Registrar of Friendly Societies, under the jurisdiction conferred on the registrar by s. 3, sub-s. 2 of the Trade Union Act, 1913, that there had been a breach of the rules, and on November 8, 1948, a decision was given by the Chief Registrar of Friendly Societies, who was of opinion that the office of chairman of the branch involved control or management of the political fund, so that the plaintiff, under the above-mentioned rule, was not eligible for that office. The registrar therefore ruled that no breach of the rule had been committed.

The plaintiff then brought an action against the union and other defendants claiming "(a) A declaration that the
 " rules of the defendant union do not comply with s. 3, sub-s. 1
 " (b) of the Trade Union Act, 1913 (1) and that it is unlawful

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 s. 3, sub-s. 1: " The funds of a " are in force providing—
 " trade union shall not be applied, " (a) That any payments in the
 " either directly or in conjunction " furtherance of those objects are
 " with any other trade union, " to be made out of a separate
 " association, or body, or other- " fund (in this Act referred to as
 " wise indirectly, in the further- " the political fund of the union),
 " ance of the political objects " and for the exemption in accord-
 " to which this section applies " ance with this Act of any
 " (without prejudice to the " member of the union from any
 " furtherance of any other political " obligation to contribute to such
 " objects), unless the furtherance " a fund if he gives notice in
 " of those objects has been " accordance with this Act that
 " approved as an object of the " he objects to contribute; and
 " union by a resolution for the " (b) That a member who is
 " time being in force passed on " exempt from the obligation to
 " a ballot of the members of the " contribute to the political fund
 " union taken in accordance with " of the union shall not be
 " this Act for the purpose by a " excluded from any benefits of
 " majority of the members voting; " the union, or placed in any
 " and where such a resolution " respect either directly or
 " is in force, unless rules, to be " indirectly under any disability
 " approved, whether the union " or at any disadvantage as
 " is registered or not, by the " compared with other members

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“ for the funds of the defendant union or any part thereof
“ to be applied either directly or indirectly or in conjunction
“ with any other trade union association or body or otherwise
“ indirectly in furtherance of any political object to which
“ s. 3 of the Trade Union Act, 1913, applies so long as any
“ rules necessary for complying with the said s. 3, sub-s. 1 (b)
“ are not in force ; (b) an injunction restraining the defendants
“ from so applying the funds of the defendant union
“ or any part thereof so long as any rules necessary for
“ complying with the said s. 3, sub-s. 1 (b) are not in force ;
“ (c) a declaration that in r. 21 (8) the words ‘ and
“ ‘ shall be ineligible to occupy any office or representative
“ ‘ position involving any such control or management ’
“ are void ; (d) a declaration that the removal of the plaintiff
“ from the office of chairman of the Woodford Halse Branch
“ of the defendant union was unlawful and that the ruling
“ that he was ineligible for such office was wrong.”

Lloyd-Jones K.C., J. Harcourt Barrington, and Horatio Vester for the plaintiff. This is the first occasion on which the position of a member who is exempt from the obligation of contributing to the political fund of a trade union has arisen for consideration by the court in relation to an office held by him. There is not in force at present any statutory provision or any provision in the rules which covers the position of a non-contributing member. The position of chairman of a branch of the union is important and can be carried on without his being a contributor to the political fund. The present machinery provides inadequately for the duality of the funds.

Dewhurst v. Clarkson (1) concerns the method of making the rules. The question to be considered here is whether the ruling of the registrar is conclusive. In *Laing v. Reed* (2) the certificate of a barrister appointed to certify rules was under consideration.

The plaintiff's case is that there is no rule in force which satisfies s. 3 of the Trade Union Act, 1913. They also referred to *Cullerne v. London and Suburban General Permanent Building Society* (3) ; *Rosenberg v. Northumberland Building Society* (4) ;

“ of the union (except in relation
“ to the control or management
“ of the political fund) by reason
“ of his being so exempt, and that
“ contribution to the political
“ fund of the union shall not be

“ made a condition for admission
“ to the union.”

(1) (1854) 3 E. & B. 194.

(2) (1869) L. R. 5 Ch. 4.

(3) (1890) 25 Q. B. D. 485.

(4) (1889) 22 Q. B. D. 373.

and *Forster v. National Amalgamated Union of Shop Assistants, Warehousemen, and Clerks* (1).]

Sir Walter Monckton K.C. and *J. V. Nesbitt* for the National Union of Railwaymen. In the result the matters in issue are in a very narrow compass, the questions being (1.) the effect to be given to the approval referred to in s. 3, sub-s. 1 of the Act; and (2.) whether the rules are ultra vires the Act. When the plaintiff complained to the registrar under s. 3, sub-s. 2 of the Act, the registrar held that the office was one which involved the control or management of the political fund, and dismissed the complaint. There was no breach of the rules in holding that the plaintiff was ineligible. The registrar drew his jurisdiction from sub-s. 2; he considered the rules and the material before him and found that the position of chairman involved management of the political fund. [They referred to *Dewhurst v. Clarkson* (2) and *Murray v. Scott* (3).]

Lloyd-Jones K.C., replied.

Cur. adv. vult.

May 25. *DANCKWERTS J.*, reading his judgment, stated the facts and continued:

The plaintiff now brings this action against the National Union of Railwaymen, the three general trustees of the union and the three trustees of the Woodford Halse Branch, for certain relief, based on the contention that the provisions of r. 21 (8), do not comply with the requirements of s. 1, sub-s. 3 of the Trade Union Act, 1913.

The Trade Union Act, 1913, was passed in consequence of the decision in *Amalgamated Society of Railway Servants v. Osborne* (4), that nothing in the Trade Union Acts justified a trade union in having a fund for political purposes. There is no doubt that the intention of the Act was to enable a trade union to apply funds collected from its members to political objects, subject to certain limitations and safeguards for members who did not wish to contribute to funds for such objects. Section 1 and s. 2, sub-s. 1 of the Act enabled a combination to be registered as a trade union notwithstanding that its objects or powers included the furtherance of political objects, provided that the principal objects of the combination were those objects (described in this Act as "statutory

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(2) (1854) 3 E. & B. 194.

(3) (1884) 9 App. Cas. 519.

(4) [1910] A. C. 87.

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"objects") which are to be found in the Trade Union Amendment Act, 1876, and are the regulation of the relations of workmen and masters and the like. Section 2, sub-s. 2 of the Act provides as follows: "The Registrar of Friendly Societies shall not register any combination as a trade union unless in his opinion, having regard to the constitution of the combination, the principal objects of the combination are statutory objects," and provides for withdrawal of the certificate in certain circumstances. Sub-section 3 enables an unregistered trade union to obtain a certificate that it is a trade union. Sub-section 4 provides for an appeal to the court from a refusal of the registrar to register. Sub-section 5 provides that a certificate of the registrar that a trade union is a trade union within the meaning of this Act shall, so long as it is in force, be conclusive for all purposes.

Section 3 is the section under which the questions in this action primarily arise. [His Lordship read s. 3, sub-s. 1 and continued:] Sub-section 2 contains the provisions under which the registrar dealt with the complaint made to him by the plaintiff in the present case. The terms of the sub-section are as follows: "If any member of a trade union alleges that he is aggrieved by a breach of any rule made in pursuance of this section, he may complain to the Registrar of Friendly Societies, and the Registrar of Friendly Societies, after giving the complainant and any representative of the union an opportunity of being heard, may, if he considers that such a breach has been committed, make such order for remedying the breach as he thinks just under the circumstances; and any such order of the registrar shall be binding and conclusive on all parties without appeal and shall not be removable into any court of law or restrainable by injunction, and, on being recorded in the county court, may be enforced as if it had been an order of the county court. In the application of this provision to Scotland the sheriff court shall be substituted for the county court, and 'interdict' shall be substituted for 'injunction'."

Sub-section 3 defines the political objects to which the section applies and sub-s. 4 provides that a resolution under this section approving political objects as an object of the union shall take effect as if it were a rule of the union. Section 4 of the Act requires a ballot for the purposes of the Act to be taken in accordance with the rules of the union to be approved

for the purpose, whether the union is registered or not, by the Registrar of Friendly Societies, and the registrar is directed not to approve any such rules "unless he is satisfied that every member has an equal right, and, if reasonably possible, a fair opportunity of voting, and the secrecy of the ballot is properly secured."

Sub-section 2 of s. 4 provides as follows: "If the Registrar of Friendly Societies is satisfied, and certifies, that rules for the purpose of a ballot under this Act or rules made for other purposes of this Act which require approval by the registrar, have been approved by a majority of members of a trade union, whether registered or not, voting for the purpose, or by a majority of delegates of such a trade union voting at a meeting called for the purpose, those rules shall have effect as rules of the union, notwithstanding that the provisions of the rules of the union as to the alteration of rules or the making of new rules have not been complied with." "Rules made for other purposes of this Act which require approval by the registrar" in that sub-section appear to include the rules providing for para. (2) and (b) in s. 3, sub-s. 1.

Section 5 and the form in the schedule to the Act provide for the manner in which a member who objects to contribute to the political fund of the union is to give notice and claim exemption. Section 6 provides for two alternative methods in which the exemption can be provided for. One method is by a separate, that is, additional, levy, from members who are not exempt from contribution to the political fund, and the other method is by relief of the exempted members from part of the contributions required from members of the union. In the present case, the defendant union, by r. 21 (7), has adopted the latter method. Sir Walter Monckton in his argument for the defendants placed some reliance on this feature, but, so far as management of the general fund of the union and of the political fund are concerned, for practical bookkeeping purposes I cannot see that it makes any difference whether the political fund is made up by taking additional contributions from members who are not exempted or by taking over a portion of the total contributions made by such members of the union.

In pursuance, or, at any rate, in purported pursuance, of the Act, a political fund was established by the defendant union, and rules were made for this political fund and were

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approved by the Registrar of Friendly Societies. Though later approvals have been given to the rules by the registrar on amendment, r. 21 (8), which is the subject of the plaintiff's attack in the present case, has existed in its present form since 1934 and was approved by the registrar on November 21, 1934, when he gave a certificate for the purpose. The plaintiff contends that the rule does not satisfy the requirements of, or offends against, the provisions of para. (b) of s. 3, sub-s. 1 of the Act, so that no part of the funds of the defendant union may lawfully be applied for political purposes; and, if this is a sound contention, it would appear that funds of the union may have been applied unlawfully to political purposes ever since 1934. This indicates the seriousness and importance of the questions which arise in this action. It is evident that during this long period the rule has been taken to have been unobjectionable. On the other hand, the plaintiff was believed to be qualified for office until his eligibility was recently challenged.

The actual amounts involved in each year, so far as this branch of the union is concerned, are comparatively small sums. In 1947 the branch had 476 members of whom 113 were exempt from contribution to the political fund. In 1948 the numbers were respectively 471 and 134. In 1947 the income of the general fund was 689*l* 5*s*. and of the political fund was 39*l*. 6*s*. 11*d*. In 1948 the figures were respectively 648*l*. 1*s*. and 38*l*. 1*s*. 8*d*. But the rule is one of the rules of the National Union of Railwaymen, and the whole political fund of the union appears to be affected. Under s. 3 of the Act, application of the funds of a trade union in furtherance of political objects is prohibited unless the conditions laid down in that section are satisfied.

These conditions are that (1.) furtherance of those objects has been approved as an object of the union by a resolution passed on a ballot of the members, and (2.) rules to be approved by the Registrar of Friendly Societies are in force, which must provide (a) that any payments are to be made out of a separate political fund in respect of which any member can obtain exemption from contribution by an appropriate notice and (b) a non-contributing member shall not be excluded from benefits of the union or placed under any disability or disadvantage as compared with other members of the union (except in relation to the control or management of the political fund) and contribution must not be made a condition of

admission to the union. But if these conditions are satisfied, then, as was observed by Eve J., in *Forster v. National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1), the statutory restrictions cease to operate.

In the present case the conditions as to approval of the furtherance of the objects by a resolution of the members of the union and the rules providing for a separate political fund and for exemption from contribution by notice and as regards admission to the union are satisfied. The difficulties arise in respect of para. (b) in the sub-section, but the rules have received the approval of the Registrar of Friendly Societies. In *Forster's* case (1), Eve J., held that, where a question as to a breach of a rule had been referred to the registrar under s. 3, sub-s. 2 of the Act, it was not open to the parties to raise the same question in an action in the High Court of Justice. In the present case, therefore, I do think that I am bound to proceed on the footing that the effect of r. 21 (8) is to disqualify the plaintiff from holding the office of chairman of the branch, because that office involves the control or management of the political fund of the branch.

It is unnecessary, therefore, for me to consider in detail the rules which involve control or management of the political fund of the branch by the chairman. The point is that the same officers and committee manage both the general fund and the political fund. The issue in this action is not whether the plaintiff was unlawfully deprived of the office of branch chairman, but whether the political fund of the union is lawful. The registrar was solely concerned with the question whether there had been a breach of the rules, and he expressly disclaimed any intention to deal with the question whether the rule complied with the provisions of s. 3 of the Act. But the registrar did express the opinion that the rule, by making the plaintiff, as a non-contributing member, ineligible for the office of chairman, placed him under a disability as compared with other members of the union, and it appears obvious to me that this is so. The argument for the plaintiff is that the rule, so far from providing that the plaintiff, though exempted from contribution to the political fund, is not placed under any disability or at any disadvantage as compared with other members, in fact, by its concluding two lines, places the plaintiff under such a disability or at such a disadvantage. Accordingly (it is said) the second condition of the provisions

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of s. 3, sub-s. 1 is not satisfied, and the prohibition against the application of the funds of the trade union in furtherance of political objects is fully operative.

On behalf of the defendants it is submitted that (1.) it is not now admissible to consider such criticisms of r. 21 (8), since the rules have received the approval of the Registrar of Friendly Societies, as required by the section, and (2.) the rule is not properly open to criticism because the ineligibility for office produced by the rule falls within the permitted exemption contained in para. (b) in sub-s. 1 of s. 3. If the effect of the registrar's approval is as contended, then, of course, it is an end of the matter, as the validity of the rule cannot be impugned. In sub-s. 1 of s. 3 of the Act, though the approval of the registrar is required, the result of such approval is not expressly stated. In the course of the discussion I was referred to a number of cases in which the effect of approval of rules, or a certificate in respect of them, was considered by the court.

In *Dewhurst v. Clarkson* (1), the court was concerned with a certificate which a barrister was required to give under the Friendly Societies Act, 1834 (4 and 5 William IV, c. 40) s. 4 that the rules of a society were "in conformity to law and to the provisions of the said recited Act" (10 Geo. IV c. 56) "and this Act," the section also providing that "all rules, alterations and amendments thereof, from the time when the same shall be certified by the said barrister or advocate, shall be binding on the several members and officers of the said society, and all other persons having interest therein." The majority of the court thought that the barrister's certificate barred objection as to the regularity of the manner in which the rules had been made, but observed that the barrister was not required to inquire into the regularity of the making of the rules, so that his certificate was not to be considered a judicial determination of the matter. Erle J. thought that the certificate only fixed the time when the rules became operative and so did not bar objection as to regularity.

That case was followed or applied in *Rosenberg v. Northumberland Building Society* (2), a case on the Building Societies Act, 1874, which, by s. 17, provides that the registrar "if he finds that the rules contain all the provisions set forth in section sixteen of this Act, and that they are in conformity with this Act," is to register the rules. The decision of the

(1) 3 E. & B. 194.

(2) 22 Q. B. D. 373.

court was that the registrar's certificate was conclusive as to the validity of the proceedings taken by the society for the passing of the new rules.

In *Laing v. Reed* (1), a case on the Building Societies Act, 1836 (6 & 7 William IV c. 32), it was held that a certificate of a barrister given under that Act was not conclusive as to the validity of a rule authorizing borrowing of money by the society; and that the certificate could not prevent the court from deciding that such a rule was ultra vires. Criticisms of this case, in respect of the decision that such borrowing was ultra vires, have not touched the question as to the effect of the certificate.

In *In re Guardian Permanent Benefit Building Society* (2), *Murray v. Scott* (3) and *Cullerne v. London & Suburban General Permanent Building Society* (4) the discussion does not appear really to have been directed to the conclusiveness or otherwise of the certificate which had been given. *Davie, etc. v. Colinton Friendly Society* (5), is a Scottish case in regard to the Friendly Societies Act, 1855, in which it was held that the certificate of the registrar, though essential to the validity of the rules, was no bar to a challenge of them in a court of competent jurisdiction. The court seems to have thought that it was the duty of the registrar to refuse a certificate if the rules were illegal on their face, and it is to be noted that the statute provided that "as against such member or person such "certificate shall be conclusive of the validity thereof." There is some basis for Sir Walter Monckton's contention that the view of the court was that the object of the certificate was merely to show the date from which the rules came into effect.

So far as any principle can be ascertained from these cases, they indicate that the approval or certificate normally prevents inquiry into the regularity of the steps taken to pass the rules, but does not prevent judicial inquiry into the validity of the rules if it is contended that they are ultra vires. But these cases were decided in reference to different statutory provisions, and I cannot regard them as of great assistance on the question which I have to decide. The only reported case on the effect of s. 3 of the Trade Union Act, 1913, appears to be *Forster's* case (6), and, as it was admitted in that case that rules had been passed by the members and approved by

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(2) (1882) 23 Ch. D. 440.

(3) 9 App. Cas. 519.

(4) 25 Q. B. D. 485.

(5) (1870) 9 Macph. 96.

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the registrar providing for paras. (a) and (b) of sub-s. 1 of s. 3, Eve J., was not faced by the questions which I have to decide.

In the Trade Union Act, 1913, under sub-ss. 2 and 3 of s. 2, the registrar has to be satisfied of certain matters requiring careful consideration before he grants his certificate, and by sub-s. 5 his certificate is then made conclusive for all purposes. Under sub-s. 2 of s. 3, the registrar's order for remedying a breach of any rule is made binding and conclusive on all parties without appeal; and it is a reasonable inference that his decision that there has not been a breach of a rule cannot afterwards be re-opened in court (as Eve J. held in *Forster's* case (1)). The registrar has to be satisfied as to certain matters in connexion with the ballot under sub-s. 1 of s. 4. Sub-section 2 of s. 4 requires the registrar to be satisfied that rules which require his approval have been approved by a majority of the members or delegates, and then his certificate bars objection on the ground that the provisions of the rules of the union as to the making or alteration of rules have not been complied with. All these sub-sections contain provisions showing what the registrar is to consider or what the effect of his certificate is to be. In sub-s. 1 of s. 3 there is merely a provision that the relevant rules are "to be approved" by the registrar.

It was contended on behalf of the defendants that such approval must be meant to have some effect, and that the intention is that trade-union officials might safely act on the rules and treat them as valid once they have been approved by the registrar. There is much force in this contention, and it is not unreasonable that trade-union officials should suppose that, when rules have passed the scrutiny of the registrar, they can be treated as effective. On the other hand, the cases to which I have referred show that certificates of approval under a number of statutes have been treated as effective only to prevent subsequent allegations of failure to comply with forms of procedure and not to prevent attack on the material validity of the rules. In the present case, the legislature has made it plain in other sections that certificates under this Act are to be conclusive, but has omitted any such provision in the present context. It seems to me that the approval mentioned in s. 3, sub-s. 1 cannot be treated as conclusive so as to preclude consideration by the court whether the conditions required by the sub-section have been satisfied.

I have therefore to consider whether r. 21, (8) is in

(1) [1927] 1 Ch. 539.

accordance with the requirements of para. (b) of the sub-section. It is to be observed that, when first read, the rule appears to follow the requirements of that paragraph and confine discrimination and ineligibility to positions involving control or management of the political fund, which is the exception mentioned in the paragraph. It is not until it is discovered that an exempted member is disqualified from holding the office of chairman because that office involves control or management of the political fund as well as the general fund, that doubts begin to arise.

Sir Walter Monckton contended (as I understood his argument) that (1.) as a matter of practical administration of the affairs of the branch it is necessary to combine the control and management of the general fund and the political fund in the hands of the same officials of the branch, and (2.) accordingly, the exempted member must suffer the disability or disadvantage of exclusion from office by reason of the exception permitting disability or disadvantage where the control or management of the political fund is involved. There is, he said, no provision confining the exception to functions concerned with control or management of the political fund. This is an ingenious argument, but be it observed that the effect is to exclude an exempted member from any part in the affairs of his branch as an officer or a representative by reason of the fact that the same persons administer (as the rules are constituted) both the general and the political funds. This appears to me to be equivalent to the exception swallowing the provisions of para. (b) which were primarily designed to prevent disability from being imposed on the exempted member. In other words, as long as the constitution of the union fails to separate the control and management of the political fund from other functions of the union, there is no limit to the area of the exception and an exempted member might find himself excluded from practically all the activities of his branch. I cannot believe that this is the result of an exception introduced into a provision designed to protect the exempted member. It is entirely reasonable that a non-contributor should be excluded from control or management of the political fund; it is quite another matter that he should be excluded from any office in his union or branch.

I reach the conclusion, therefore, that r. 21 (8) in conjunction with the other rules of the union, offends against the provisions of para. (b) of sub-s. 1 of s. 3 of the Act.

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Consequently the conditions laid down by that section are not satisfied, and application of the funds of the defendant union in furtherance of political objects is prohibited by the section. It is regrettable that a fund which has been administered in good faith for so many years should be found to be unlawful; but that is the result of the way in which the rules of this union have been drafted and its scheme of administration or government. It is the constitution of the union and its branches which cause r. 21 (8) to have an effect which was, I think, not anticipated, and which was not perceived when steps were taken to have the plaintiff disqualified from the office of chairman of the Woodford Halse branch of the union.

That being so, I think that the plaintiff is entitled to a declaration in the form claimed in para. (a), but with one alteration in the wording, which I do not quite like: i.e., "A declaration that the rules of the defendant union now in force do not comply with s. 3, sub-s. 1 (b) of the Trade Union Act, 1913, and that it is unlawful for the funds of the defendant union or any part thereof to be applied either directly or indirectly or in conjunction with any other trade union association or body or otherwise indirectly in furtherance of any political object to which s. 3 of the Trade Union Act 1913 applies so long as," then leave out the word "any," so that it reads, "so long as rules necessary for complying with the said s. 3, sub-s. 1 (b) are not in force."

Then, as regards (b), it seems to me that the plaintiff is entitled to an injunction — again with the omission of the word "any." The injunction, of course, would operate only as long as the rules are in their present form, and the union can alter the rules at any time. The operation of the injunction will, however, be suspended and there will be liberty to apply. The plaintiff is not entitled to the relief claimed under (c) (that has been decided by the registrar); nor is he entitled to the declaration claimed under (d).

Order accordingly.

Solicitors: *Greenwood, Milne & Lyall; Pattinson & Brewer.*

J. L. D.

In re MOUNT EDGCUMBE (EARL OF)HARMAN
J.

[1950. M. 378.]

1950

May 19.

Will—Settled land—Mansion house—Partial destruction by enemy action—Destruction of chattels—Heirlooms—Claim against War Damage Commission—10,000l. admitted under private chattels scheme—Application by trustees for leave to apply in purchase of furniture and chattels to equip mansion house—Chattels to devolve as heirlooms under will—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 64, sub-s. 1—War Damage Act, 1941 (4 & 5 Geo. 6, c. 12), s. 46, sub-s. 2.

A testator directed his trustees to allow all the chattels and effects not otherwise specifically disposed of by him to devolve and be enjoyed as heirlooms along with the settled estates therein after devised in settlement. In 1941, the mansion house forming part of those estates and nearly all the chattels in it were almost totally destroyed by enemy action. The War Damage Commission admitted a claim in respect of chattels insured under the private chattels scheme, and the trustees for the purposes of the Settled Land Act of the settlement duly received from them the sum of 10,000l. A summons was taken out to determine whether this sum might be applied in the purchase of furniture or other chattels suitable to equip the mansion house.

Held, that, as and when the house was rebuilt, a sum not exceeding 10,000l. might be expended in the purchase of such furniture and chattels for the mansion house as the trustees (other than the tenant for life) should consider suitable to retain as heirlooms under the settlement created by the testator.

In re White-Popham Settled Estates [1936] Ch. 725 applied.

ADJOURNED SUMMONS.

By his will dated June 28, 1940, the Earl of Mount Edgcumbe, who died on April 18, 1944, bequeathed to his trustees, whom he also appointed to be trustees for the purposes of the Settled Land Act, 1925, all the chattels and effects not otherwise disposed of by him on trust, except as to such of them as the trustees should consider to be unsuitable to be retained in the settlement, "that my trustees shall allow the same (hereinafter called 'the heirlooms') to devolve and be enjoyed as heirlooms along with my said settled estates hereinafter devised in settlement."

The settled estates he devised in strict settlement and these included Mount Edgcumbe, an historic mansion on the banks

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of the Tamar opposite Plymouth, for many years the seat of the family.

The testator gave all his personal property to his trustees on the usual trusts for sale and conversion and payment of outgoings; and also directed that the balance should be held on the trusts and subject to the powers and provisions on which capital money arising under the Settled Land Act, 1925, from the settled estates would be held.

In 1941 the mansion house, with nearly all its valuable contents, was almost totally destroyed by enemy action. The testator had insured the contents under the private chattels scheme under the War Damage Act, 1941, and the chattels so insured included both chattels which, if they had been in existence at his death, would have fallen to be settled as heirlooms and others which would not have been so settled. A claim in respect of the insured chattels was, after the death of the testator, admitted by the War Damage Commission to the amount of 10,000*l.*, which sum was duly received by the trustees for the purposes of the Settled Land Act, 1925, of the settlement.

The tenant for life, the present Earl of Mount Edgumbe, took out a summons, seeking a declaration "that the applicant "or other the person who may for the time being be a tenant "for life or person having the powers of a tenant for life in "possession under the said settlement may be authorized to "direct the sum of 10,000*l.* received from the War Damage "Commission pursuant to the War Damage Act, 1941, in "respect of chattels belonging to the said testator at the "mansion of Mount Edgumbe which were destroyed in his "lifetime by enemy action to be applied in the purchase of "furniture or other chattels suitable for the equipment of the "said mansion upon the footing that any chattels so purchased "should be held upon the trusts and subject to the powers and "provisions expressed in cl. 5 of the will of the said testator "as to the chattels thereby directed to devolve as heirlooms."

Rawlence for the plaintiff. What is, in effect, being asked for is an unauthorized investment of capital money. It is intended that the house shall be rebuilt. The persons interested say that they would like to live there, but not unless it is suitably furnished. The trust gave the trustees a veto on anything which they did not think it suitable to

retain. The plaintiff relies on s. 64 of the Settled Land Act, 1925 (1), *In re White-Popham Settled Estates* (2) and *In re Scarisbrick Resettlement Estates* (3). [Counsel also referred to s. 46, sub-s. 2, of the War Damage Act, 1941 (4).]

The principle to be found in these cases shows that the transaction is within the jurisdiction of the court, as the proposal is for the benefit of all the persons interested under the settlement.

Peter Foster, Burnett-Hall, and Lord Mancroft, for the various defendants, supported the application.

HARMAN J. [after stating the facts] The testator, by his will settled his residuary personal estate on trusts to correspond with the uses concerning his realty. Clause 24 of his will directed that the nett balance should be held "Upon the trusts and subject to the powers and provisions upon and subject to which capital money arising under the Settled Land Act 1925 from my settled estates or investments representing the same would be held."

Therefore this 10,000*l.* is now capital money under the Settled Land Act to be devoted to purposes to which capital money may be devoted under that statute. It is not one of those purposes to devote it to the purchase of chattels in circumstances like these. There is a plan, but no more than a plan, for rebuilding the Elizabethan part of this mansion.

(1) Settled Land Act, 1925, s. 64, sub-s. 1: "Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorized by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

(2) [1936] Ch. 725.

(3) [1944] Ch. 229.

(4) War Damage Act, 1941,

s. 46, sub-s. 2: "A devise or bequest of an interest in, or in the proceeds of sale of, land which sustains war damage in respect of which a value payment is made . . . contained in a testamentary disposition made before the occurrence of the war damage shall, in the absence of any contrary intention expressed therein, or in any other testamentary disposition made by the testator, have effect as if it had included a bequest of any such payment, or of any part of any such payment, to which the testator might become entitled in respect of that interest."

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A design has been prepared, and the War Damage Commission has apparently agreed that it is to some extent a case for a "cost of works" payment, and that the commission will rebuild the mansion house to an extent which will produce, not a very large house like the former one, but a mansion of a reasonable size preserving the features of the historic mansion of which the walls are still standing.

This will not be of much use unless there is a prospect of somebody's living there. Nobody can live there unless it is furnished. The tenant for life says that, though it would be his desire to live there it will be quite impossible for him to do so unless he be given some help towards furnishing the place. He suggests that the 10,000*l.*, which, after all, in a kind of moral sense, represents the chattels settled by the testator's will, might be devoted to that purpose. I am satisfied that I have power under s. 64 of the Settled Land Act, 1925, to effect this transaction, because, after all, it is for the benefit of the persons interested.

That view of the section was taken in *In re White-Popham Settled Estates* (1), where Eve J., held that he could not sanction a certain transaction because it did not affect the settled land. The Court of Appeal, taking a wider view, said that it was proper if affecting beneficially the persons interested under the settlement. That is enough for my purpose in this case. I have before me all the existing remaindermen under this settlement, and all of them are willing. Two of them are infants, and they, of course, cannot consent, but they appear by their guardian, who thinks that it would be for their benefit that this expenditure should be incurred. Accordingly, I am willing that it should be incurred, but only on terms. In the first place, 10,000*l.* is a small sum in these days considered as devoted to the furnishing of a mansion such as this. Let it be said, on the other hand, that the chattels which the testator settled by his will were confined to such chattels as his trustees considered suitable to be retained in settlement, that is to say, they were not merely things which would be consumed in use or things of purely temporary utility, but substantial articles suitable to be kept as heirlooms. Secondly I do not feel that it is right to allow the money to be spent now, when there is no mansion house in which to put the chattels. I propose to sanction the purchase, by the tenant for life, as and when the mansion house, or parts of it, are

rebuilt so as to be ready for occupation to the extent of not more than 10,000*l.*, of such furniture and chattels for the mansion house as the Settled Land Act Trustees for the time being, other than the tenant for life himself, consider to be suitable to be retained in settlement as heirlooms under the settlement created by the testator's will.

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Order accordingly.

Solicitors : *Farrer & Co.*

J. L. D.

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[1948. P. 334.]

1950

Building Society—Dissolution—Annual meetings during period of dissolution—Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 32, 40—Building Societies Act, 1894 (57 & 58 Vict. c. 47), ss. 2, 9.

May 11.

A building society which is in dissolution is not required by the Building Societies Acts, 1874 and 1894, to hold annual meetings after the beginning of the dissolution. *Kemp v. Wright* [1895] 1 Ch. 121 distinguished.

ADJOURNED SUMMONS.

The Pall Mall Building Society was founded in 1932 as a permanent building society with the object of making advances to members from its funds on the security of freehold or leasehold estates by way of mortgage. The rules of the society so far as relevant are set out in the judgment of Danckwerts J.

By an instrument executed on April 2, 1940, the society went into dissolution in accordance with s. 32, sub-s. 3 of the Building Societies Act, 1874 (1). Three trustees were appointed by that instrument, of whom the plaintiffs were the survivors, one having died in 1942. The instrument provided that, after payment of the claims of depositors and other creditors, the funds of the society should be divided among the members. The Registrar of Friendly Societies, by a letter of January 29, 1941, informed the trustees that it did not appear necessary to continue holding annual meetings while the society was in dissolution. No further meetings

(1) The relevant sections are fully stated in the judgment.

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were held, although annual reports and accounts were circulated among the members. Some time later, about November 7, 1949, the registrar informed the trustees by telephone that he had revised his former opinion and thought that annual meetings ought to be called while the society was in dissolution. He did not, however, intend to take any steps to compel the trustees to do so. The question asked by the summons was whether the plaintiffs ought to call annual meetings of members each year until the dissolution of the society was completed.

Montgomery White K.C. and *M. Albery* for the plaintiffs, trustees under the instrument of dissolution. If there is any legal obligation to hold annual meetings, it must have been imposed either by the instrument of dissolution, or by the society's rules, or by statute. There is nothing to be found in any of these requiring the society to hold annual meetings once it has gone into dissolution. Section 9 of the Building Societies Act, 1894, merely says that the Building Societies Acts shall continue to apply to a society while it is in dissolution; but the obligations imposed by the rules are not obligations imposed by statute. Section 9 therefore does not mean that rules relating to annual meetings continue in force at the present time. The rules only apply to a society while it is in active existence. The society terminated its existence by the instrument of dissolution. All that remained was for it to wind up its affairs; it had ceased to exist as an active body.

J. A. Brightman for a member of the society opposing the application. The trustees are under a duty to convene annual meetings during the period of dissolution, (1.) by virtue of the rules of the society, in particular rr. 21 to 25; and (2.) by implied statutory obligation. Rule 25 which prescribes annual meetings is not limited in terms to holding annual meetings so long as the society is not in dissolution, and it continues in force until the dissolution has been completed. It is clear from s. 32 of the Act of 1874 that the legislature does not regard the dissolution of a building society as something which takes place in one instant of time. The rules of the society remain operative during the period of dissolution: *Kemp v. Wright* (1). The society is therefore obliged to continue to hold annual meetings.

(1) [1895] 1 Ch. 121, 125.

The rules of the society and the Building Societies Acts must be read together. The directors are officers of the society, and therefore, by s. 21 of the Act of 1874, they are bound by the rules. By s. 9 of the Act of 1894, on the beginning of the dissolution of the society, the duties of the directors under the rules were transferred to the trustees of the instrument of dissolution. Accordingly the trustees are bound by the rules which require the directors to submit annual accounts and to call annual meetings. Rule 25 is somewhat vague: it does not say who shall convene a meeting; but it is a matter of necessary implication that it is the directors. By s. 9 this duty now falls on the trustees. There is nothing in the Act which says that the rules cease to have effect as soon as a dissolution has begun.

Apart from the rules, there is an implied statutory obligation on the trustees to call annual meetings. Section 40 of the Act of 1874 prescribes that the accounts of a society shall be prepared annually or more frequently, and contemplates that they will be presented to a general meeting annually, or more frequently, as the case may be. It is implied therefore that a general meeting will be held at least annually; and there is nothing in s. 2 of the Act of 1894 which gets rid of that implication. There is no reason why this particular society should not hold annual meetings until it is finally dissolved.

Montgomery White K.C., in reply. *Kemp v. Wright* (1) only lays down that the rights of the members in a society are dependent on the rules and that those rights are not altered by the dissolution. It was said that all the administrative duties now fall on the trustees of the instrument of dissolution; but this does not mean that it is their duty to observe all the rules. Many of the rules could not be applicable to the period of dissolution. The rules are only effective now to regulate the rights of the members inter se, that is, as to their shares in the society's assets. Section 40 of the Act of 1874, which, it is said, imposes a duty on the trustees to call a meeting, has been superseded by s. 2 of the Act of 1894. The legislature contemplated that there might be circumstances in which no meetings would be held. One must not construe any statute, in the absence of an express provision, so as to impose a duty the breach of which involves a fine.

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DANCKWERTS J., stated the facts and continued:—The question which I have to decide to-day is whether the position the society now being that it is in dissolution, the plaintiffs ought to call annual general meetings of the members each year until the dissolution of the society shall be finally completed.

The section under which the society was dissolved is s. 32 of the Building Societies Act, 1874. That section provides as follows: "A society under this Act may terminate or be dissolved—1. upon the happening of any event declared by its rules to be the termination of the society." That would only apply to a terminable society which was to come to an end in a certain event. This society is a permanent society and therefore it has no fixed date for termination. "2. By dissolution in manner prescribed by its rules. 3. By dissolution with the consent of three fourths of the members, holding not less than two thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution 4. By winding-up, either voluntarily under the supervision of the court or by the court, if the court shall so order, on the petition of any member authorized by three fourths of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the society"

This society has been dissolved pursuant to its rules, combined with the sub-s. 3 which I have just read: that is to say, by an instrument signed by three-fourths of the members, holding not less than two-thirds of the number of shares in the society. The society, therefore, either has been dissolved or is in process of dissolution. At the conclusion of that section, the following provision appears: "Notice of the commencement and termination of every dissolution or winding-up shall be sent to the Registrar, and registered by him."

Another section, s. 11 of the Building Societies Act, 1894, refers to "the commencement of the dissolution" and "the termination of the dissolution." That curious provision is not supported by any definition or other statutory provision indicating when a dissolution may be considered to have terminated. It is easy enough to see when it may have commenced," but it is very difficult to see exactly what is meant by "the termination of the dissolution."

There is no doubt that the society has either been dissolved

or put into dissolution, so that it is no longer operative as a society in the sense of a going concern. If and so far as I am unrestricted and unhampered by statutory provisions or any necessary deductions from them, I should reach the conclusion without difficulty that it was quite inconsistent with the present position that annual general meetings of the members should continue to be held; but what I have to consider is whether there is any statutory provision or any provision, possibly, in the rules of the society which compels me to the conclusion that, notwithstanding the fact that the dissolution has at any rate begun, there is still a duty to call the members of the society together once at least in every year for the purpose of an annual general meeting.

Section 16 of the Building Societies Act, 1874, thus prescribes matters which are to appear in the rules of a society: "The rules of every society hereafter established under this Act shall set forth,—(1.) The name of the society, and chief office or place of meeting for the business of the society (3.) The purposes to which the funds of the society are to be applied, and the manner in which they are to be invested (5.) The manner of altering and rescinding the rules of the society, and of making additional rules: (6.) The manner of appointing, remunerating, and removing the board of directors or committee of management, auditors, and other officers:" So it would appear that directors are officers. " (7.) The manner of calling general and special meetings of the members: (8.) Provision for an annual or more frequent audit of the accounts, and inspection by the auditors of the mortgages and other securities belonging to the society:" Then, missing out (9.), (10.) and (11.): "(12.) The powers and duties of the board of directors or committee of management and other officers (14.) The manner in which the society, whether terminating or permanent, shall be terminated or dissolved."

I turn to the rules of the society:—Rule 1 provides for the name. Rule 2 provides: "The object of the society which is permanent shall be to raise, by the subscriptions of the members, a fund for making advances to members out of the funds of the society, upon security of freehold or leasehold estate, by way of mortgage." Rule 3 provides: "The funds shall be raised by shares, to be called uncompleted and completed shares. The value of every share shall be 10*l*. Shares may be issued from time to time in the discretion

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“ of the board, but no preferential shares are to be issued.” Rule 4 provides : “ Every person subscribing for a share “ shall be a member ” and r. 5 provides for subscriptions, and there is a provision about interest and transfer. Rule 21, which I read as amended, provides : “ The business of the “ society shall be conducted by not less than five or more “ than ten directors one of whom may be a managing director. “ The remuneration of the board shall be fixed by the members “ at the annual meeting. One third of the board, or as near “ that proportion as possible, and those appointed by the “ board (if any) during the year shall go out of office at every “ annual meeting, but shall be eligible for re-election without “ a re-nomination, and the vacancies shall be filled up annually “ as provided by these rules. Every nomination for the office “ of director shall be signed by ten members duly qualified “ to nominate and be sent to the secretary in the month of “ April next before the annual meeting.” There is a provision about withdrawing names and for retirement in certain events and the qualification of every director, then : “ The secretary “ shall be appointed by the directors who shall fix his remunera- “ tion and may remove him from office on just cause being “ shown.”

The rules also provide : “ 22. At every annual meeting the “ members shall elect and appoint an auditor, who must be “ a practising accountant, who shall audit the accounts of the “ ensuing year, and shall inspect the mortgages and other “ securities belonging to the society. The remuneration of the “ auditor shall be fixed by the members at the annual meeting. “ The board shall have power to remove an auditor and to “ appoint another in his place. 23. Notices of all meetings “ of the members shall be sent to all members at least “ seven days before such meetings. 24. Meetings of the “ members may be held at such place in the County of London “ as the board shall approve. 25. A meeting of the members “ shall be held annually not later than March 31 in each year “ to receive the annual account and statement and report “ of the directors, and for general purposes. 26. Special “ meetings shall be held whenever directed by the board, and “ the board shall give such direction at any time upon the “ written request of twenty members of the society, who shall “ give to the board written notice of the proposals to be made “ in such special meeting, and deposit with the secretary such “ sum of money as the board shall deem sufficient to pay the

“ expenses of convening and holding such meeting, and the
 “ members present at such meeting shall decide whether
 “ such expenses shall be paid out of the funds of the society
 “ or out of the money so deposited as aforesaid. 39. The
 “ board shall, at the end of the year, prepare, or cause
 “ to be prepared, a general statement of the funds and
 “ effects of or belonging to the society, in the form pre-
 “ scribed by the Chief Registrar, in accordance with the
 “ Building Societies Acts, together with an account of the
 “ money received and expended since the publication of the
 “ preceding periodical statement, and such statement shall be
 “ certified by the auditor and countersigned by the secretary,
 “ and every member shall be entitled to a copy . . . 42. The
 “ society may be dissolved in any manner prescribed by
 “ the Building Societies Act, 1894, s. 32, sub-s. 3 or 4, and the
 “ Secretary of State’s regulations.” There is a definition of
 “ year,” which shall mean the society’s official year, and every
 year shall be taken to expire on December 31; and “ by the
 “ word ‘ board ’ shall be understood board of directors.”

Those are the rules, and, turning to the Building Societies Acts again, I find in s. 21 of the Act of 1874, this provision :
 “ The rules of a society under this Act shall be binding on the
 “ several members and officers of the society, and on all
 “ persons claiming on account of a member, or under the
 “ rules, all of whom shall be deemed and taken to have full
 “ notice thereof.” Section 23 is about officers giving security,
 and s. 24 about officers accounting; s. 25 concerns “ Invest-
 “ ment of surplus funds ”; and s. 26 is about transfer of stock,
 all of which are powers committed to the board of directors.
 I have already referred to s. 32.

Section 40 of the Building Societies Act, 1874, provides :
 “ The secretary or other officer of every society under this
 “ Act shall, once in every year at least, prepare an account
 “ of all the receipts and expenditure of the society since the
 “ preceding statement, and a general statement of its funds
 “ and effects, liabilities and assets, showing the amounts
 “ due to the holders of the various classes of shares respectively,
 “ to depositors and creditors for loans, and also the balance
 “ due or outstanding on their mortgage securities (not including
 “ prospective interest), and the amount invested in the funds
 “ or other securities; and every such account and statement
 “ shall be attested by the auditors, to whom the mortgage
 “ deeds and other securities belonging to the society shall be

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“ produced, and such account and statement shall be counter-
“ signed by the secretary or other officer ; and every member,
“ depositor, and creditor for loans shall be entitled to receive
“ from the society a copy of such account and statement,
“ and a copy thereof shall be sent to the registrar within
“ fourteen days after the annual or other general meeting
“ at which it is presented”

Section 40 was thus amended by the Building Societies Act, 1894, s. 2 : “ Every annual account and statement under
“ s. 40 of the Building Societies Act, 1874, shall be made up
“ to the end of the official year of the society to which it relates,
“ and shall be in such form and shall contain such particulars
“ as the Chief Registrar of Friendly Societies may from time
“ to time, with the approval of a Secretary of State, direct,
“ either generally or with respect to any society or class of
“ societies”

Sub-section 2 provides for the certificate of an auditor, and sub-s. 3 provides : “ A copy of every such annual account
“ and statement shall be sent to the registrar within fourteen
“ days after the annual or other general meeting at which it
“ is presented, or within three months after the expiration
“ of the official year of the society, whichever period expires
“ first.” So there is a provision under which the annual account is to be transmissible to the registrar notwithstanding that the annual meeting of the society has not yet been held. Then there is a provision about the “ official year.”

Section 5 contains provisions which enable the registrar, with the consent of the Secretary of State, to summon a meeting of the society in certain conditions which depend either upon the application of one tenth of the whole number of members of the society, or one hundred members where the society consists of more than a thousand members or “ where evidence
“ is furnished by a statutory declaration of not less than three
“ members of a society, of facts which, in the opinion of the
“ registrar, call for investigation, or for recourse to the
“ judgment of a meeting of the members.”

Section 9 is a provision possibly of great importance here :
“ Where a society under the Building Societies Acts is being
“ dissolved in manner prescribed by its rules or in pursuance
“ of the consent of three fourths of the members, the pro-
“ visions of the Building Societies Acts shall continue to
“ apply in the case of the society as if the liquidators or other
“ persons conducting the dissolution of the society or the

“trustees appointed under the instrument of dissolution
“were the board of directors or committee of management
“of the society.”

Mr. Montgomery White has argued that there is no obligation on the trustees of the instrument of dissolution to summon a general meeting of the society, either annually or otherwise, because if there is such an obligation it must be found, he says, either in the instrument of dissolution or in the rules or in the statutory provisions.

To consider first of all the instrument of dissolution, s. 32 prescribes what is to appear in it. By s. 32, sub-s. 3: “The instrument of dissolution shall set forth—(a) the “liabilities and assets of the society in detail; (b) the “number of members, and the amount standing to their “credit in the books of the society; (c) the claims of “depositors and other creditors, and the provision to be “made for their payment; (d) the intended appropriation “or division of the funds and property of the society; (e) the “names of one or more persons to be appointed trustees for the “special purpose, and their remuneration.” Therefore, there is nothing in s. 32 which compels the instrument of dissolution to contain anything about meetings at all.

The instrument of dissolution here, after certain statements which are in the nature of recitals and referring to depositors and other creditors, and stating “such moneys shall be paid “out of the first moneys which shall be received by the trustees “hereby appointed,” contains two paras, 4 and 5, which tell the trustees what they are to do. Paragraph 4 states: “After payment of the claims of depositors and other creditors, “the funds and property of the society shall be appropriated “and divided among the members thereof in the proportion “of the amount standing to each member’s credit in the “books of the society.” Paragraph 5 simply appoints the trustees and directs what remuneration they are to receive. So there is nothing in the instrument of dissolution which in terms requires any annual or other meeting to be called at all. It is said, however, that s. 9 of the Building Societies Act, 1894, requires the trustees to carry out the duties which were imposed on the board of directors under the rules of the society, and therefore to call annual meetings and to submit annual accounts in accordance with the provisions of the rules.

Mr. Brightman, in support of that argument, referred to

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Kemp v. Wright (1), which, he said, shows that after a society has gone into dissolution its rules remain operative. He argued therefore that the rules of the society which prescribe the provision of annual accounts and the calling of annual meetings are still in operation in the present case. But I think that all that *Kemp v. Wright* (1) decided was that the rights of the members of the society depend upon the rules in the sense that, immediately before the dissolution, their rights in the assets of the society are fixed by those rules ; and that the dissolution did not alter their rights.

Of course, the contract between the members of the society inter se depends on the rules of the society, and to that extent the rules of the society must remain operative after the society has gone into dissolution. That does not in the least decide the question whether provisions relating to meetings remain any longer in operation ; and, as Mr. Montgomery White observed, s. 9 simply provides that the trustees appointed under the instrument of dissolution continue to be subject to the provisions of the Act as if they were the board of directors or committee of management of the society.

There is in terms no reference to the rules of the society at all ; but Mr. Brightman said that the rules of the society must be read in conjunction with the provisions of the Act ; that r. 39 contains a provision under which the board are to prepare a general statement of the funds and effects of the society in every year at the end of the year ; and that, as, by s. 40 of the Act of 1874, an annual account of that kind is to be prepared by the secretary or other officer of the society, for the purposes of s. 40 the board of directors must be treated as together as the " other officer " referred to in that section, so that there are still annual accounts to be taken. By implication, it is argued, those accounts are to be audited and sent to the registrar within a certain time ; and they must be approved by an annual meeting of the society ; and, therefore, r. 25 imposes upon the trustees, as it did upon the board of directors, the requirement of calling an annual meeting of the society to deal with the annual accounts.

The point is not without difficulty, and I can see the force of the arguments which are put forward in support of that proposition ; but it seems to me that there is in fact no provision in the Act which leads necessarily to that result. There

are a number of provisions in the rules which are quite incompatible with their operation at the present time. Indeed, there are several provisions of the Act which are quite unworkable if you translate literally "board of directors" into "trustees of an instrument of dissolution." For instance, s. 26 of the Act of 1874 may be quite unworkable.

On the whole, it seems to me that if there is to be imposed upon the trustees the duty of calling annual meetings of the company and producing annual accounts for submission to the Registrar of Friendly Societies, breach of which will, be it observed, involve them apparently in heavy penalties under s. 21 of the Building Societies Act, 1894, some specific provision or some necessary implication from the provision of the Acts must be found. I am unable to find any such provision or any such implication, and therefore I come to the conclusion that there is nothing in the Building Societies Acts which imposes upon the trustees under the instrument of dissolution any obligation to call annual meetings of the society for the purposes of the Acts after the beginning of the dissolution.

Declaration accordingly.

Solicitors : *Callingham, Griffith & Bate.*

I. G. R. M.

In re AN INFANT.

[1950. S. 644]

Procedure—Infant—Application to make ward of court—Parties—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 9.

On an application under the Law Reform (Miscellaneous Provisions) Act, 1949, by originating summons to make an infant a ward of court, the infant should not be made a party to the summons unless the master or a judge so decides.

PROCEDURE SUMMONS.

The father of an infant by this summons sought the direction of the court whether the infant should be made a party to an application to make her a ward of court. The respondent to the summons was the mother of the infant.

DANCK-
WERTS
J.

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PAYNE

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COE.

ROX-
BURGH
J.

1950

May 9, 25.

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J.

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Lionel Edwards for the father. This summons affects infants generally, not only the infant in the present case, for it raises the question what is the correct procedure on a summons to make an infant a ward of court. Such a summons is now governed by s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949 (1).

Four new rules on this matter under R. S. C. Order LIV P are set out in [1950] W. N. (Miscellaneous) 24, being headed: "Applications made pursuant to s. 9 of the " Law Reform (Miscellaneous Provisions) Act, 1949 " (2).

The whole purpose of s. 9 of the Act is to simplify, bring up to date and make cheaper the procedure of the court with regard to wards of court. From the point of view of the applicant father here decision is required whether the infant is or is not a necessary party to this application.

[ROXBURGH J. And, from my own point of view, it is a pity that Parliament did not make clear what it intended.]

If the infant is to be a party, it may be convenient in some cases that he should be applicant, and in others that he should be respondent. He cannot, however, be a necessary party in every case, so that it must rest with the court in each case to decide whether he shall be a party or not. Had the legislature intended that he should be a party, the appropriate wording of sub-s. 2 would have been " Where an application " is made for such an order ' by or against,' not ' in respect of,' " an infant."

(1) Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, sub-s. 1: " Subject to the provisions of this " section, no infant shall be made " a ward of court except by virtue " of an order to that effect made " by the court.

Sub-section 2: " Where appli- cation is made for such an order " in respect of an infant, the infant " shall become a ward of court on " the making of the application, " but shall cease to be a ward of " court at the expiration of such " period as may be prescribed by " rules of court unless within that " period an order has been made " in accordance with the applica- " tion."

Sub-section 3: " The court " may, either upon an application " in that behalf or without such " an application, order that any " infant who is for the time being " a ward of court shall cease to be " a ward of court."

(2) R. S. C. Or. LIV. P, r. 1: " An application to make an " infant a ward of court shall be " made to the Chancery Division, " either by originating summons " or by an ordinary summons in " any action in the Chancery " Division to which the infant " is a party. The summons shall, " in addition to any other relief " sought, asks pecifically that the " infant be made a ward of court."

[ROXBURGH J. Is it not contrary to natural justice that the status of any person should be changed in that person's absence? That question gives rise to the further question whether being made a ward of court is a change of status.]

If the contention that under the new procedure an infant is not a necessary party is correct, there will be no "unnatural justice" that did not exist before, for, as soon as an application is made under the new procedure, the infant will become a ward of court. [Counsel referred to the statement in the Annual Practice, 1949, vol. 1, at p. 2017.]

The court is wholly covered by s. 9, sub-s. 3, and can order that an infant who is for the time being a ward of court shall cease so to be, whether or not any person applies for such an order.

As for the question whether the infant is a proper party, the court can, in the exercise of its discretion, order the infant to appear as applicant or respondent, as the court thinks fit. Thus, the infant ought in no case to be made a party unless the court so directs.

F. Bower Alcock for the mother. The mother associates herself with the observations made on behalf of the father. It is, of course, essential that the question whether the infant need be a party to the application should be decided.

[ROXBURGH J. I am quite satisfied that it would be dangerous for me to base my judgment on the statement at p. 2017 of vol. 1 of the Annual Practice for 1949. I am not going to decide as a matter of law what Parliament has avoided deciding by the Act. The formidable argument against you is that the new procedure affects the rights of absent parties.]

Before the Law Reform (Miscellaneous Provisions) Act, 1949, was passed, there were, broadly speaking, two methods of making an infant a ward of court: by a settlement and by a summons in proceedings. Under the Act, it is left to the court to decide who shall be parties to an application to make an infant a ward of court. The entire structure of s. 9 is directed to that.

[ROXBURGH J. There is not to be found in s. 9 any express or implied direction on that point.]

That is so; but the section, taken in its context, does not fetter the discretion of the court in any way whatsoever.

[ROXBURGH J. I would like to avoid making the infant a party and to say that, on an application to make an infant a ward of court, the infant should not be a party unless the judge thinks that he ought to be. I am quite clear,

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however, that to make my judgment one of law would be dangerous. I may have to decide that the question is not a question of law, that it is not covered by s. 9, and that the court is entitled to make its own procedure. If that should prove to be so, the matter becomes one of practice with which all my brethren are concerned.]

That view, it is submitted, is correct. The whole scheme of the Act has, quite properly, left the procedure fluid.

Cur. adv. vult.

May 25. ROXBURGH J. read the following judgment:— This is a procedure summons to obtain directions from the court whether the infant should be made a party to an application to make the infant a ward of court under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949. The infant might, of course, have herself applied by her next friend for such an order. But this is an application by her father, to which her mother has been made respondent. The question is whether the infant is also a necessary party.

The Act itself does not supply the answer. At first sight, it might seem strange to make an order about a person who is not a party to the proceedings. On the other hand, the infant is generally very young, and the appointment of a guardian ad litem and service on him or her involves expense which generally results in no corresponding benefit. The court would, of course, not make the order if in doubt whether it was for the infant's benefit, and it has indisputable jurisdiction to order the infant to be made a respondent if it desires to do so. For example, the infant might be approaching full age; or the parties might be so much wrapped up in matrimonial disputes that they cared nothing for the infant. The court has an unfettered discretion. But I propose to express the view, after consultation with my brethren of the Chancery Division, that an infant should not be made a respondent to an originating summons under the Act unless the master or a judge so directs, and I give no such direction in the present case.

Order accordingly.

Solicitors: Warren, Murton & Co.; Tuck & Mann, for Wallace, Robinson & Morgan, Birmingham.

K. R. A. H.

In re OPPENHEIM'S WILL TRUSTS
WESTMINSTER BANK, LD. *v.*
OPPENHEIM AND OTHERS.

HARMAN
J.

1950

May 12.

[1949. O. 269.]

Will—Construction—Forfeiture—Life interest “so long as he shall be able to give a personal discharge”—Tenant for life certified of unsound mind—Appointment of receiver—Ability to give personal discharge.

The testator, by his will, directed his trustees to pay the income of his residuary estate to his nephew when he “shall attain the age of 25 years . . . during the rest of his life-time so long as he shall be able to give a personal discharge for such income and shall not have become bankrupt or assigned or charged with such income in favour of any other person or corporation in any of which events the trusts in his favour shall determine.” The testator died in 1946 and the income was duly paid to the nephew, who was then over 25 years of age. In 1948 he entered an institution as a voluntary patient. Later he was certified as a person of unsound mind. Eventually a receiver was appointed.

Held, that the receiver was the nephew's statutory agent, through whom he was able to give a personal discharge for the income, and that therefore the forfeiture clause did not come into operation.

In re Marshall [1920] 1 Ch. 284 followed.

In re Westby's Settlement, ante 296, considered.

ADJOURNED SUMMONS.

The testator, Henry James Oppenheim, made his will on October 13, 1936. He appointed the plaintiff bank and his brother Augustus to be his personal representatives. He had two other brothers, one of whom died in 1927 leaving issue two daughters, who were defendants, and the other of whom died without issue in 1941. He had a sister, Rosalinda, who was also a defendant. At all material times he had one nephew, the second defendant, Hugo Charles Henry Oppenheim, born on September 9, 1917.

His will recited that he did not give his money to his brothers because provision was otherwise made for them, and that his main consideration was that his nephew should benefit. After various pecuniary and specific legacies he gave his residuary estate on trust for sale, and, subject to the payment of an annuity to his sister, Rosalinda, on trust for his nephew (if the nephew should survive him) in the following terms: “When my said nephew shall attain the age of 25 years

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"to pay to him the income of my residuary estate during the rest of his life time so long as he shall be able to give a personal discharge for such income and shall not have become bankrupt or assigned or charged such income in favour of any other person or corporation in any of which events the trusts in his favour shall determine." There followed further trusts to arise on the nephew's death or the earlier determination of his interest.

The testator died on December 17, 1946. The income was duly paid to the nephew, who was then over 25 years of age. In 1948 he entered an institution as a voluntary patient, and subsequently he was certified as being of unsound mind. On January 25, 1949, a reception order was made treating him as a person of unsound mind. Later a receiver of his estate was appointed, the receivership dating back to the time when his disability began. The question to be determined was whether the certification of the nephew as a person of unsound mind brought about a determination of his interest in the residuary estate of the testator.

Cozens-Hardy Horne for the plaintiff bank, one of the executors and trustees of the will.

Cross K.C. and *G. D. Johnston* for all defendants except the nephew. The trust of income in favour of the nephew determined when he became incapable of managing his affairs. A person under the disability of lunacy cannot give a valid receipt, and therefore he is unable to give a personal discharge within the meaning of this clause. The words "unable to give a personal discharge" must mean incapable of giving a proper receipt: they exactly fit the event which has happened here. Accordingly a forfeiture is incurred. It cannot be said that the forfeiture clause is void for uncertainty because it is uncertain for how long he is unable to give a personal discharge; for it is known when a person is certified as being of unsound mind and when he is discharged as being a person of sound mind: see *Lunacy Act, 1890, s. 80*.

Montgomery White K.C. and *J. A. Brightman* for the nephew. The receiver is the nephew's statutory agent, and a receipt by him is the receipt of the nephew. Therefore the nephew is still able to give a personal discharge, and no forfeiture is incurred: *In re Marshall* (1). The object of this clause is to prevent the money from getting into other hands; but

lunacy does not deprive him of the enjoyment of the income, and is not within the contemplation of this clause. A forfeiture clause should not be construed beyond the fair meaning of the words used : *In re Greenwood* (1). See also *In re Westby's Settlement* (2) and *In re Custance's Settlements* (3). Alternatively, this clause is void for uncertainty : it is impossible to say exactly when lunacy occurred or when it ceased : see *Sifton v. Sifton* (4).

HARMAN J. stated the facts and continued :—The question which I have to decide is this : has the event which has happened, of Hugo's being certified as a person of unsound mind and unable to manage his own affairs, brought about a cesser or determination of his interest which is to last " so long as he shall be able to give a personal discharge " for the income ?

It is said, on the one hand, that a person who cannot give a valid receipt because he is under the disability of lunacy cannot give a personal discharge, and that therefore a termination came about on the day when he ceased to be able to sign a valid receipt ; that is to say, I take it, either on the date of his certification or on the date of the reception order, as to which there might have to be an inquiry.

On the other hand, it is said that that is not the object or meaning of this clause which was intended to provide against the deprivation of the enjoyment of the income by the recipient of it, and that an event like lunacy which deprives him of no part of the income is not within the mischief of the clause. Moreover, it is said that " a personal discharge " does not mean that he himself must write the receipt for the income : he can give his discharge by an agent no less than by himself.

On that point, I have been referred to *In re Marshall* (5), where Eve J. accepted the view (which does not seem to have been doubted since and has, indeed, been accepted in the Court of Appeal) that " The person appointed to act as a " receiver under s. 116 of the Lunacy Act, 1890, is not strictly " a receiver but the statutory agent of the person of unsound " mind, and his receipt is receipt by such person and certainly " not the less so where, as in this case, the whole income is

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(1) [1901] 1 Ch. 887, 891.

(2) Ante 296.

(3) [1946] Ch. 42.

(4) [1938] A. C. 656.

(5) [1920] 1 Ch. 284, 288.

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— —

"directed to be applied for the maintenance of such person." On that is based the argument that the receiver can give a good receipt, as undoubtedly he can, for income of the patient, and that that receipt is the patient's receipt through his statutory agent, and therefore his personal discharge.

I am also asked to take into account what Farwell J., said in *In re Greenwood* (1), to which the Master of the Rolls referred in *In re Westby's Settlement* (2), which is the latest case in this territory. The Master of the Rolls quoted a passage from the judgment of Farwell J., in *In re Greenwood* (1), where the judge said: "we must bear in mind that the courts do not construe gifts on forfeitures so as to extend their limits beyond the fair meaning of the words unless they are actually driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of a forfeiture clause to a gift such as the present."

In that case there was not any question of somebody else receiving the money, and Farwell J., held that it was not within the mischief of the forfeiture clause; and so did the Court of Appeal in *In re Westby's Settlement* (2), from which I have been quoting. There they overruled the decision of Cohen J. in *In re Custance's Settlements* (3). I need not go into that case. Cohen J. held that a statutory charge, expenses of a receiver, was a forfeiture. The Court of Appeal held that that was not the kind of charge that was intended to be aimed at by forfeiture clauses, and that it did not, in their opinion, create a charge.*

In the present case the words used are "able to give a personal discharge." Then the draftsman goes on, "and shall not have become bankrupt or assigned or charged such income." One is led to suppose—and this tends in Mr. Cross's favour—that "give a personal discharge" is something different from the inability so to do arising out of bankruptcy, assignment or a mortgage. I am asked to say that the words exactly fit that which has happened; that, owing to his disability, the nephew can no longer give a personal discharge for this money and therefore a forfeiture has come about.

On the whole, I do not feel able to accept that. I think

(1) [1901] 1 Ch. 887, 891.

(2) Ante, 296.

(3) [1946] Ch. 42.

*Reporter's Note: The position is now regulated by s. 8 of the Law Reform (Miscellaneous Provisions) Act, 1949.

that a man who has a statutory agent, as this man has, can give by his agent a personal discharge no less than, in the example suggested, if he were on the top of Mount Everest, his banker could give a personal discharge on his behalf. It seems to me also that the forfeiture was not intended to operate in a case of this kind where no one else will be entitled to the benefit of the income in the event which has happened. It was intended to prevent the income from getting into other hands. That does not occur in the present case: the whole of this income will remain for the maintenance and support of the nephew and for his use if, as may be hoped and as the report does not suggest to be impossible, he recovers.

In my opinion, therefore, the forfeiture clause has not come into operation, and he continues to be entitled to the income.

Declaration accordingly.

Solicitors: (plaintiffs and all defendants except the second defendant) *Norton, Rose, Greenwell & Co.*; (second defendant) *Petch & Co.*

I. G. R. M.

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Followed. *In re*
HUNTER
[1951] 1 Ch. 190

Followed. *Re MEYERS (dec'd.)*. [1951]
1 All E.R. 538.

[1950] Ch. 637. *In re MORGAN'S*
WILL TRUSTS.

Applied. *In re FRERE*,
DEC'D. [1951] 1 Ch. 27.

In re MORGAN'S WILL TRUSTS

LEWARNE *v.* MINISTER OF HEALTH

[1949 M. 2612.]

ROX-
BURGH
J.

1950

Appl. 27, 28.

Will—Gift to hospital—Nationalization before death of testatrix—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81).

A testatrix, by her will dated August 9, 1944, directed her trustees to hold part of her estate for the benefit of the "Liskeard Cottage Hospital." It was not disputed that the "Liskeard Cottage Hospital" meant the Passmore Edwards Cottage Hospital at Liskeard. At the date of the will the hospital was run by a committee of management and trustees, but, as the result of the vesting provisions of the National Health Service Act, 1946, as from July 5, 1948, the hospital buildings and investments vested in the Minister of Health free from trusts, and the existing committee of management was dissolved. In exercise of statutory powers a committee known as the Plymouth South Devon and

[Reported by Miss E. Dangerfield, Barrister-at-Law.]

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East Cornwall Hospital Management Committee was set up to manage and control a group of hospitals including the Passmore Edwards Cottage Hospital, and by s. 59 of the Act of 1946 that committee was given power to accept and hold property on trust for purposes relating to hospital services. The testatrix died on September 28, 1948.

Held, that the vesting provisions of the Act of 1946 and the setting up of the Plymouth South Devon and East Cornwall Hospital Management Committee in place of the committee which had administered the hospital at the date of the will did not cause the gift to lapse, for, on the true construction of the will, the gift was for the general purposes of the hospital, that was to say, for the work which at the date of the will was being carried on in those premises, which work was still continuing to be carried on despite the statutory changes which had taken place; and that payment of the sums due under the will should be made to the Plymouth South Devon and East Cornwall Hospital Management Committee to be applied by it for the purposes of the Passmore Edwards Cottage Hospital.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment. Rosina Emma Morgan, died on September 28, 1948, having made a will dated August 9, 1944. Between the date of her will and the date of her death the National Health Service Act, 1946, came into operation (i.e. on July 5 1948).

By her will she gave, devised and bequeathed her residuary estate to trustees upon trust for sale and, after making certain payments thereout, upon trust to stand possessed thereof for the benefit of the Liskeard Cottage Hospital.

At the date of her will there was at Liskeard a hospital called the Passmore Edwards Cottage Hospital, which had properties and investments, trustees, a committee of management and rules and regulations. At that date that hospital was duly pursuing its objects, which were primarily to provide nursing accommodation and medical and surgical aid for Liskeard and its district. It was, his Lordship found, that institution to which the testatrix was referring in her will, and the work of the hospital had always been and continued to be carried on on those premises.

On July 5, 1948, the building in which the hospital work was carried on at the date of the will was taken from its trustees and vested in the Minister of Health free from the trusts which previously affected it; and its investments were taken from those who formerly held them and vested in the Minister of Health free from the trusts by which they had

previously been affected. The governing body of the hospital was dissolved, but a scheme was approved under s. 11, sub-s. 3 of the Act of 1946, under which the Plymouth South Devon and East Cornwall Hospital Management Committee were created as a hospital management committee for the purpose of exercising functions with respect to the management and control of a group of hospitals which included this particular hospital. Section 59, sub-s. 6 provides that a hospital management committee shall have power to accept, hold and administer any property upon trust for purposes relating to hospital services.

This summons was taken out to have determined the question, among others, whether the gift in question in the will failed owing to the material changes brought about by the Act of 1946 (1).

(1) National Health Service Act, 1946, s. 6, sub-s. 1: " Subject
" to the provisions of this Act,
" there shall, on the appointed
" day, be transferred to and vest
" in the Minister by virtue of this
" Act all interests in or attaching
" to premises forming part of a
" voluntary hospital or used for
" the purposes of a voluntary
" hospital, and in equipment,
" furniture or other movable pro-
" perty used in or in connexion
" with such premises, being
" interests held immediately
" before the appointed day by
" the governing body of the hos-
" pital or by trustees solely for
" the purposes of that hospital,
" and all rights and liabilities
" to which any such governing
" body or trustees were entitled
" or subject immediately before
" the appointed day, being rights
" and liabilities acquired or
" incurred solely for the purposes
" of managing any such premises
" or property as aforesaid or
" otherwise carrying on the
" business of the hospital or any
" part thereof, but not including
" any endowment within the
" meaning of the next following

" section or any rights or liabilities
" transferred under that section."

Sub-section 4: " All property
" transferred to the Minister under
" this section shall vest in him
" free of any trust existing
" immediately before the
" appointed day, and the Minister
" may use any such property
" for the purpose of any of his
" functions under this Act, but
" shall so far as practicable secure
" that the objects for which any
" such property was used imme-
" diately before the appointed
" day are not prejudiced by the
" provisions of this section."

Section 7, sub-s. 4: " All
" endowments of a voluntary
" hospital to which the last fore-
" going section applies . . .
" being endowments held imme-
" diately before the appointed
" day, shall on that day be
" transferred to and vest in the
" Minister by virtue of this Act
" free of any trust existing
" immediately before that day;
" and the Minister shall establish
" a fund, to be called the Hospital
" Endowments Fund, to which
" he shall transfer all such endow-
" ments."

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J. A. Brightman for the plaintiff trustees.

Buckley for the Minister of Health, the Plymouth East Devon and South Cornwall Hospital Management Committee and the Attorney-General. The legacy is payable to the Plymouth South Devon and East Cornwall Hospital Management Committee. It was given for the general purposes of the work which at the date of the will was being done on the premises described by the testatrix. The committee and trustees which administered the hospital before the Act of 1946 was passed, have been dissolved, and the hospital is now administered by the committee set up under that Act; but the gift does not fail because of the change of administration. A gift to an unincorporated charity, such as the Passmore Edwards Cottage Hospital, is a gift for a particular purpose rather than to particular persons, and, consequently, administrative changes are immaterial: they cannot destroy the charity, for that exists so long as the purpose continues. Here the purpose of the charity is, as stated in its rules, to provide medical aid and nursing services in Liskeard and the surrounding district. That purpose is still being carried out, and the work continues on the same premises as at the date of the will. Even if the hospital had been moved to another locality, the gift would not fail if it could be shown that the activity continued. Payment of the legacy should be made to the committee at present administering the hospital, for only it can give a valid receipt. It is conceded, however, that the money should only be available for the purposes of the

Section 11, sub-s. 3: "Every
" regional hospital board shall,
" within such period as the
" Minister may by direction
" specify, submit to the Minister
" a scheme for the appointment
" by them of committees, to be
" called hospital management
" committees, for the purposes of
" exercising functions with respect
" to the management and control
" of individual hospitals or groups
" of hospitals, other than
" teaching hospitals, providing
" hospital and specialist services
" in the area of the board."

Section 59, sub-s. 1: "A
" regional hospital board and the
" board of governors of any

" teaching hospital and a hospital
" management committee shall
" have power to accept, hold and
" administer any property upon
" trust for purposes relating to
" hospital services or to the
" functions of the Board or
" Committee under Part II. of this
" Act with respect to research."

Section 78, sub-s. 1: "The
" following bodies, that is to
" say . . . (c) governing bodies
" of voluntary hospitals trans-
" ferred to the Minister by virtue
" of this Act whose functions
" wholly cease in consequence of
" this Act; shall as from the
" appointed day be dissolved . . ."

Passmore Edwards Cottage Hospital and not generally for all hospitals within the group administered by the committee.

Michael Browne for the next-of-kin. The gift should be construed as being a gift to the trustees for the time being of the hospital as an accretion to the general funds of the hospital. That construction is supported by *In re Withall* (1) and *In re Lucas* (2). It is legitimate to read "trustees" into the gift for it is impossible to give away money literally to an unincorporated association such as the Passmore Edwards Cottage Hospital. If the gift is so construed, the events which have happened since the date of the will have caused it to lapse. [Counsel referred to *In re Rymer* (3)]. There was no question here of a general charitable intention, and the particular charity designated by the testatrix ceased to exist when the hospital buildings and funds vested in the Minister free from all trusts by virtue of s. 6, sub-ss. 1 and 4, and s. 7, sub-s. 4, of the National Health Service Act, 1946, respectively, and the committee of management was dissolved by s. 78 of that Act. The fact that hospital work was still being carried on on the old premises by the statutory hospital management committee would not (even if proved) prevent the lapse.

It is conceded for the Minister that, if the statutory committee takes the gift, it should not be part of the general funds but should only be available for the purposes of the Passmore Edwards Cottage Hospital; but that will not revive the charity if it has once ceased to exist. Cases such as *In re Faraker* (4), *In re Withall* (1) and *In re Lucas* (2) rest on the principle that neither the Charity Commissioners nor the court have jurisdiction to destroy an endowed charity. An Act of Parliament can of course do so. The judgment of the Court of Appeal in *In re Kellner's Will Trusts* (5) seems to assume that, if the hospital in that case had not been a corporation incorporated by Royal Charter which had never been dissolved, it would have ceased to exist on the appointed day notwithstanding that similar work was presumably still being carried on on the old premises.

Buckley in reply: *In re Lucas* (2) is distinguishable on the facts from the present case, the charity in that case was established under a trust deed and had perpetual endowments.

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(1) [1932] 2 Ch. 236.

(2) [1948] Ch. 424, 429.

(3) [1895] 1 Ch. 19.

(4) [1912] 2 Ch. 488.

(5) Ante 46, 52.

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Consequently the question whether the charity continued to exist could be answered at any time by looking at the constitution of the charity at that time. In this case the continuity of the charity depends on the continuity of its work and cannot be affected by administrative changes.

ROXBURGH J. stated the facts and continued. There is a curious lacuna in the evidence in this case, because what to my mind is a fact of vital consequence is nowhere to be found stated in the evidence : it is that the work of the hospital has always since been and is still being carried on on those premises. I regard that as of vital importance ; my judgment proceeds upon that footing ; and, before the order is drawn up, a supplementary affidavit must be filed to that effect. If such an affidavit cannot be filed, the matter will have to be re-argued. Mr. Browne submitted for the next-of-kin that by reason of the admitted effect of the vesting provisions of the Act of 1946, of the dissolution of the old governing body and of the setting up of the new hospital management committee, the hospital had ceased to exist before the testatrix died. If that submission be well founded there would be an intestacy ; but in my judgment those factors, important though they are, do not affect the validity of this testamentary disposition.

This case involves the analysis of a gift which is in a fairly common form. This is not a gift to anybody : it is for the benefit of the Liskeard Cottage Hospital. What does that really mean ? It is important to bear in mind that in much more difficult cases than the present the courts have held that such a gift did not fail, though at the date of the death of the testator no work of the nature indicated in the will was being carried on on the premises described. Those cases show that the courts have put an enlarged construction upon such gifts ; and, though they differ from the present case, they make it necessary to tread warily.

I have considered three analyses of this gift. On behalf of the next-of-kin, it was submitted that the gift was a gift to the trustees for the time being of the Liskeard Cottage Hospital to be held by them as an accretion to the general funds of the hospital. That analysis ought to be rejected. There is no justification for importing trustees into the analysis of such a gift as this. Mr. Buckley offered a definition which I accept. He submitted that this was a gift for the general purposes of the

hospital. Amplifying that, he said that it was a gift for the work which, at the date of the will of the testatrix, was being carried on on the premises which the testatrix described.

An alternative form of words not differing in substance from those suggested by Mr. Buckley is that this is a gift to supplement the funds available for carrying on the work of the Liskeard Cottage Hospital. It is unnecessary to decide which definition is to be preferred, because, whichever is right, the gift is not defeated, since the essential feature is the continuity of the activity.

The Plymouth South Devon and East Cornwall Hospital Management Committee controls and manages more than one hospital, and by s. 59 of the National Health Service Act, 1946, it has power to hold and administer any property upon trust for purposes relating to hospital services. However, Mr. Buckley concedes (or admits for, he may or may not have been bound to do so) that in such a case as this, if the legacy is paid to the hospital management committee, it should be only available for the work carried on at the hospital described by the testatrix. The legacy should therefore be paid and transferred to the hospital management committee to be applied by them for the purposes of the Passmore Edwards Cottage Hospital.

Order accordingly

Solicitors: *Reed and Reed, for Caunter, Venning and Harward, Liskeard; The Solicitor, Ministry of Health; Ravenscroft, Woodward and Co., for Woollcombe and Yonge, Plymouth; Gibson and Weldon for Edwin Broad, Devonport; Treasury Solicitor.*

[NOTE]

Ch. Div. *Followed. Re MEYERS (decd.). [1951]*
1 All E.R. 538.

Vaisey J.

May 23, 1950

In re GLASS, DECD.

PUBLIC TRUSTEE *v.* SOUTH-WEST MIDDLESEX HOSPITAL
MANAGEMENT COMMITTEE

Followed. In re
HUNTER
[1951] 1 Ch. 190

Will—Gift to hospital—Nationalization before death of testator—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81).

Summons.

By his will dated July 2, 1948, Thomas Waterworth Glass, after appointing the Public Trustee executor and trustee, and bequeathing an annuity gave certain legacies, including a legacy of 250*l.* to the

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King Edward VII Memorial Hospital, Ealing, free of legacy duty. As the result of the National Health Service Act, 1946, which came into force on July 5, 1948, the hospital was transferred to and vested in the Minister of Health and was now managed and controlled by the South-West Middlesex Hospital Management Committee set up under that Act. The testator died on January 21, 1949. The Public Trustee as executor took out this summons to have decided whether the gift to the hospital was payable to the South-West Hospital Management Committee or how it should be applied.

R. O. Wilberforce for the plaintiff, the Public Trustee.

D. B. Buckley for the South-West Middlesex Hospital Management Committee and the Attorney-General.

Droop for Mary Hambridge Gibbons.

Burnett-Hall for the Rector and Churchwardens of St. Mary's, Cheltenham.

Cockle for Barclays Bank Limited.

VAISEY J. referred to *In re Morgan* ante, p. 637, and said that he could not distinguish between the effect of the words used in that case and the gift "to" the King Edward VII Memorial Hospital, Ealing. Accordingly, he held that the gift to the hospital should be paid to the South-West Hospital Management Committee.

Order accordingly

Solicitors: *George C. Carter & Co.*; *The Solicitor, Ministry of Health*; *Treasury Solicitor*; *Pritchard, Englefield & Co.*, for *Nunn & Ashworth, Cheltenham*; *Iliffe, Sweet & Co.*, for *Haddock, Pruen & Lintott, Cheltenham*; *Le Brasseur & Oakley*.

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Feb. 9.

[1949 P. 886]

Evershed M.R.,
Somervell and
Jenkins L.JJ.

Landlord and tenant—Covenant in lease to grant a tenancy "for a further term of three years . . . containing . . . the present covenant for renewal"—Perpetually renewable lease—Lease for 2,000 years—Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), s. 145; s. 190, sub-s. 3; sch. xv, para. 5.

By an agreement made between the defendant as landlord and the plaintiff's predecessors in title as tenants, the defendant agreed

[Reported by JOHN A. GRIFFITHS, Esq., Barrister-at-Law.]

sf the (J.R.)

to let certain premises for a term of three years, and the agreement contained a provision that "the landlord will on the written request of the tenants made three calendar months before the expiration of the term . . . grant to them a tenancy of the said term at the same rent and containing the like agreements and provisions as are herein contained including the present covenant for renewal."

Held, that, those provisions were to be taken as an expression of intention that the right of renewal was to be perpetual and that the agreement therefore came within the definition of a perpetually renewable lease contained in s. 190, para. (iii), of the Law of Property Act, 1922, which lease was converted into a demise for a term of 2,000 years by virtue of para. 5 of sch. xv to the Act of 1922.

Have v. Burges (1857) 4 K. & J. 45 followed.

Green v. Palmer [1944] Ch. 328 questioned.

Decision of Harman J., ante 33, reversed.

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APPEAL from Harman J.

By an agreement made on January 29, 1946, the defendant as landlord let to the predecessors in title of the plaintiff as tenants certain premises for a term of three years from January 30, 1946. Clause 11 of the agreement stated: "The landlord hereby agrees with the tenants"— . . . —"(b) that the landlord will, on the written request of the tenants made three calendar months before the expiration of the term hereby granted, and if there shall not be at the time of such request any breach or non-observance of any of the agreements on the part of the tenant herein contained, at the expense of the tenants grant to them a tenancy of the said premises for a further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained, including the present covenant for renewal."

On a summons taken out by the plaintiff, Harman J. held that the relevant provisions of the Law of Property Act, 1922 (1)

(1) Law of Property Act, 1922, s. 145: "For the purpose of converting perpetually renewable leases and underleases (not being an interest in perpetually renewable copyhold land enfranchised by Part V. of this Act, but including a perpetually renewable underlease derived out of an interest in perpetually renewable copyhold land) into long terms, for preventing the

"creation of perpetually renewable leasehold interests and for providing for the interests of the persons affected, the provisions contained in the Fifteenth Schedule to the Act shall have effect."

Section 190, para. (iii.): "'A perpetually renewable lease or underlease' means a lease or underlease the holder of which is entitled to enforce (whether

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only operated where the lease was on the face of it perpetually renewable and contained an express covenant for perpetual renewal; and, that, there being no such covenant in the agreement in suit, a lease for 2,000 years was not created.

The plaintiff appealed.

M. Albery for the plaintiff. The question on this appeal is whether this agreement on its true construction gives the tenant a perpetual right of renewal. Section 145 of the Law of Property Act, 1922, provides for the conversion of perpetually renewable leases and underleases into long terms as provided by sch. XV to the Act. That schedule provides by para. 5 that a grant after the coming into force of the Act of a term or other leasehold interest with a covenant or obligation for perpetual renewal shall take effect as a demise for a term of 2,000 years. Section 190 defines a perpetually renewable lease as meaning a lease the holder of which is entitled to enforce its perpetual renewal. The effect of these provisions of the Act is to give the tenant a right to continue his tenancy until he chooses to determine it. This saves expense and trouble by giving the tenant the right to determine, instead of having from time to time to exercise the right to continue. This saves the tenant the cost of renewal. In applying these provisions to a lease, it is not a question of what the parties intended. If s. 145 is held not to apply to this agreement it will be possible to get round the section in every case. The most ordinary method of creating a perpetually
 “ or not subject to the fulfilment
 “ of any condition) the perpetual
 “ renewal thereof, and includes a
 “ lease or underlease for a life or
 “ lives or for a term of years,
 “ whether determinable with life
 “ or lives or not, which is per-
 “ petually renewable as aforesaid,
 “ but does not include copyhold
 “ land held for a life or lives or
 “ for years, whether or not deter-
 “ minable with life where the
 “ tenant had before the com-
 “ mencement of this Act a right of
 “ perpetual renewal subject or not
 “ to the fulfilment of any con-
 “ dition.”

By sch. XV., para. 5 : “ A grant
 “ after the commencement of this
 “ Act, of a term, subterm, or

“ other leasehold interests with a
 “ covenant or obligation for per-
 “ petual renewal, which would
 “ have been valid if this Part of
 “ this Act had not been passed,
 “ shall (subject to the express
 “ provisions of this Act) take effect
 “ as a demise for a term of two
 “ thousand years or in the case of
 “ a subdemise for a term less in
 “ duration by one day than the
 “ term out of which it is derived,
 “ to commence from the date
 “ fixed for the commencement of
 “ the term, subterm, or other
 “ interest, and in every case free
 “ from any obligation for renewal,
 “ or for payment of any fines, fees,
 “ costs, or other money in respect
 “ of renewal.”

renewable lease is the form used in this agreement. It would be odd if the usual way of creating a perpetually renewable lease were held not to be within s. 145.

On its true construction this agreement gives a right to perpetual renewal. This is in accordance with old conveyancing practice whereby the words "including" or "excluding this present covenant" were used to confer or exclude a perpetual right of renewal: see Bythewood and Jarman's Conveyancing (4th ed.) vol. III, pp. 217 and 591, note (t); Davidson's Precedents and Forms in Conveyancing (2nd ed.), vol. V, pp. 128, note (f), and 192. This long course of practice derives authority from *Hare v. Burges* (1): see also *Wynn v. Conway Corporation* (2). *Green v. Palmer* (3) is plainly distinguishable on the facts. Alternatively, it is submitted, that case was wrongly decided.

Hesketh for the defendant. The option granted in this case is similar to that in *Green v. Palmer* (3). The provisions of the Act do not apply when the right to renew perpetually is not expressed on the face of the document as it was in *Northchurch Estates Ltd. v. Daniels* (4).

This case is distinguishable from *Hare v. Burges* (1): the parties here obviously had no intention of creating a lease for 2,000 years. The intention was to grant a tenancy only to the persons named in the agreement, and such a lease could not last beyond the duration of their lives. The expression in the covenant was "tenants" and not "tenants and their assigns."

EVERSHED M.R. The short question raised by this appeal is whether the tenancy agreement or lease of January 29, 1946 (for it is conceded that for present purposes the result is the same, by whichever description it is called) created what is known to conveyancers as a perpetually renewable lease, so that, according to the Law of Property Act, 1922, the term granted by the document is converted into one of two thousand years. The judge came to the conclusion that there was sufficient material to be found in the language of the document (and the intention of the parties which he discerned from the document) to avoid a conclusion which plainly, I think, he felt to involve almost an absurdity; and I confess that I feel sympathy with him.

It is, to my mind, at least probable that the parties to this document had not sufficiently informed themselves of the effect of modern legislation relating to real property. However that may

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(1) (1857) 4 K. & J. 45.

(3) [1944] Ch. 328.

(2) [1914] 2 Ch. 705.

(4) [1947] Ch. 117.

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be, the judge, in order to avoid the result at which he somewhat shied, found that a distinction could be drawn, for the purposes of applying the Law of Property Act, 1922, between cases in which there was to be found a covenant or an obligation in actual terms for perpetual renewal on the one hand, and other cases in which the language used might, under the old law, have produced a similar effect, but was not in terms a covenant or obligation for perpetual renewal. I have come to the conclusion, with all respect to the judge, that that distinction involves a refinement which cannot be supported.

It is first, I think, important to pay regard to the language of the relevant sections of the Act of 1922 before approaching the material paragraph of sch. XV. Mr. Albery told us that the sections were not in fact brought to the attention of the judge. Perhaps if they had he might have reached a different conclusion. The first relevant section is s. 145. [His lordship read it.] That section clearly manifests an intention by Parliament to put an end to perpetually renewable leasehold interests. [His lordship read s. 190, para. (iii), and continued :] In the light of that definition it seems to me impossible to hold that in setting its face against perpetually renewable leaseholds Parliament only intended to legislate with regard to those leaseholds in the way in which it did where the covenant or obligation was one in actual terms for perpetual renewal. The definition makes it reasonably clear, to my mind, that Parliament was dealing not only with that type of renewable lease but also with any renewable lease which falls within the definition, that is, one whereby or whereunder any lessee is entitled to enforce the perpetual renewal thereof.

It is convenient next to look at the vital para. 5 of sch. XV. [His lordship read it.] Other paragraphs in the schedule are relevant to the effect of this conversion, and, to put it briefly, what occurs is that the tenant, instead of having periodically to apply in the prescribed manner for a new lease and pay any fines, costs or other money to be paid, remains on, but with a right, on giving the requisite notice, to put an end to the demise of two thousand years and thus, so to speak, to contract out of the bargain instead of contracting into it.

That statement, however, perhaps does rather less than justice to the full nature of the change. From the words I have read from para. 5 it is clear that Parliament thought it right that tenants should be relieved from the financial burden of costs or fines which might be exigible on renewal. They are also relieved of

this : [commonly in such renewable leaseholds the obligation of the landlord to renew is made conditional (and these courts have tended to construe the condition strictly) upon the tenant's not being, at the date of his request, in any breach of his covenants for repair or otherwise : so that, practically speaking, the landlord had been given a fairly firm control of the tenant's performance of his obligations.] The effect of the conversion is very much to lighten the burden on the tenant in practice. Nevertheless, as Mr. Albery points out, the tendency of modern legislation has obviously been in favour of protecting the security of a tenant's tenure. There is perhaps nothing surprising, therefore, in the mere circumstance that the conversion does, as I think, substantially favour the tenant.

These general considerations, however, are perhaps of more interest than relevance. The question is whether this document which we have to construe falls within the definition. [His lordship referred to the lease, and continued :]

Mr. Hesketh took the point that the absence of any definition clause making the word "tenants" in this agreement comprehend not only the plaintiff's predecessors in title but all other persons in possession under the demise was a strong indication against treating this covenant as one for perpetual renewal. He did, however, concede that s. 78 of the Law of Property Act, 1925, will apply so that the covenants which can be said to relate to the land would enure for the benefit not only of the original tenants, but of any successors to their interest or estate. It is, I think, impossible to say (and Mr. Hesketh was unable to support the suggestion with any authority) that a covenant for renewal in this form is not a covenant relating to land. It seems to me as a matter of construction equally impossible to hold that, if the covenant for quiet enjoyment and the covenant for renewal are treated as entered into with the tenants and their successors in title, nevertheless the benefit of the right to renew is limited to the original tenants. It seems to me therefore that we have to approach this clause by treating it as though it were an agreement or covenant by the landlord with the tenants and their successors in title giving to the tenants and their successors whatever right of renewal on its proper construction paragraph (b) contains.

That being so, the argument comes down to the single point : is a covenant not in terms expressed to be one for perpetual renewal, that is to say, not using those words or using any cognate expression, but being one which provides for renewal on the terms and conditions "as are herein contained (including

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the present covenant for renewal) " one for perpetual renewal within the meaning of the Act of 1922 ?

Harman J., as I have said, thought not, and he relied in a measure on *Green and Palmer* (1), decided by Uthwatt J., as supporting his view. I shall later refer to that case again, but I note that the judge, though he derived some comfort from it, expressed himself as not entirely able to comprehend the reasoning which underlay it.

The truth is, I think, that it has long been established that, as a matter of conveyancing machinery, a well-recognized method of producing perpetually renewable leaseholds was by just this form of covenant which has been adopted here. The authority, and it has stood not only unchallenged but affirmed and cited time and again over nearly one hundred years, is that of *Hare v. Burges* (2), a case which came before Sir William Page Wood V.-C.

The lease in that case was a lease by deed for lives, and it contained various covenants, including, in particular, this covenant in regard to renewal. Paul, Lord Methuen, who was the lessor, " did covenant, grant and agree with Sir John Hare," the lessee, " that in case Sir John Hare, his heirs or assigns, " should, upon the decease of either of them, the said Charles " Hare, Leonard and Harris, be desirous of taking a further or " renewed lease of the said demised premises for another life, " and should, within the space of twelve calendar months next " after such decease, give notice in writing of such desire unto " Lord Methuen, or the person or persons for the time being " entitled to the reversion of the premises expectant on the " determination of the demise thereby made, and should nomin- " ate any person in the room or stead of the person who should " have so departed this life, Paul Lord Methuen, or the person " or persons for the time being entitled as aforesaid, would, at " the request and at the costs and charges of Sir John Hare, his " heirs or assigns, and on the surrender of the present lease, on " payment of the sum of £134 5s. od. by way of fine or premium " for such renewal, forthwith duly make and execute unto Sir " John Hare, his heirs or assigns, a new and further lease of all " and singular the premises thereinbefore demised, for and " during the natural life of the person so to be nominated, and " the lives of such of them, the said Charles Hare, Leonard and " Harris, as should be then living, and of the survivors and " survivor of them, at and under the same yearly rent, and with

(1) [1944] Ch. 328, (2) 4 K. & J. 45.

"and subject to such and the same covenants, provisos and agreements, 'including this present covenant,' as were therein contained."

The argument was that each new lease granted was not to be treated as containing the whole of that provision, particularly not the words "including this present covenant," as being set out in full again; in other words, that this provision should be construed as promising to put into the new lease all the provisions of the covenant in question except those words "including this present covenant," so that it operated once but no more.

That argument was rejected, and the Vice-Chancellor held that the effect of inserting those words "including this present covenant" was to express in terms an intention to make the right to renew perpetual. The material part of the judgment, following the statement, which has been so often repeated, that there is a tendency in the court against construing provisions on documents of this kind as providing for perpetual renewal, is this (1): "That being the rule of the court in construing a covenant so generally worded, conveyancers have taken this course: finding that the courts would not imply such an intention, they have said, 'We will express it.' And the course they have taken in order to express it has been to add to the general words which the courts have held as necessary to imply such an intention"—I think that should read, "as insufficient to imply such an intention"—"the words 'including this present covenant.' That this has been the history of the law in these cases is clear." He then refers to Jarman's Conveyancing Precedents in reference to the practice of conveyancers.

That statement seems to me to be as clear an authority as possible that the addition of the words "including this present covenant", or comparable words, to the general terms "upon like conditions and agreements as are herein contained" is, as a matter of conveyancing, to be taken as an expression of intention that the right of renewal is to be perpetual.

Wynn v. Conway Corporation (2) concerned a document different in form because it had language which in terms involved perpetual renewal. But its significance for present purposes seems to be that *Hare v. Burges* (1) was cited, and, I think, clearly approved, in this court. Not only that, but, from the examples given to us by Mr. Albery, taken from Davidson's Conveyancing

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(1) 4 K. & J. 45, 56.

(2) [1914] 2 Ch. 705.

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Precedents and Bythewood & Jarman's Conveyancing Precedents, the statement of Lord Hatherley in *Hare v. Burges* (1) is quite obviously borne out by the facts. In those circumstances I feel unable to say that a lease containing such a formula as the one in the present case is not within the definition which I have already read from s. 190 of the Act of 1922. In other words, it is, having regard to this formula, a perpetually renewable leasehold, and the results of conversion under sch. XV to the Act of 1922 inevitably follow.

Green v. Palmer (2) was a case in which perhaps any judge would feel even stronger inclination than in the present to avoid a result which on the face of it would appear unlikely to have been contemplated by the parties, for it was a furnished tenancy for a six-month period only. The material passage which the court had to construe was: "The tenant is hereby granted the option of continuing the tenancy for a further period of six months on the same terms and conditions, including this clause, provided the tenant gives to the landlord in writing four weeks' notice of his intention to exercise his option." Uthwatt J., having regard to the circumstances of the case, read this qualification, as I understand his judgment, into the provision which I have just quoted: that "the same terms and conditions including this clause" must be read as meaning "including this clause" on the first occasion; but that, when the clause came to be operated again, there was no ground for once more reproducing the whole formula, including the right or option to renew. I share with Harman J. considerable difficulty in following the logic of the argument, but it may well be a circumstance which has to be borne in mind that this was a six-month tenancy of furnished premises. The report does not contain a full statement of all the terms of the lease. It may have contained covenants or obligations with regard to specific furniture which might have forced a court to give a strained or artificial construction to a formula which otherwise in essentials I should have thought hardly possible to distinguish from that of the present case.

Mr. Hesketh had to concede that his main argument involved this court's saying that *Hare v. Burges* (1) could not be treated as authority. If the whole of the facts in *Green v. Palmer* (2) are stated in the report it is difficult to see how it can stand with *Hare v. Burges* (1); and, since I regard the latter case as well-established, it would follow that *Green v. Palmer* (2) ought not to be followed. But it may be that in the case of that furnished

(1) 4 K. & J. 45, 56.

(2) [1944] Ch. 328.

tenancy there were other provisions to which we are not referred in the report and which might necessitate an artificial construction of the particular words. * I therefore say no more about it than this, that it seems to me that if *Green v. Palmer* (1) were to be followed in another case it would have to be shown that facts in *Green v. Palmer* (1) were very special and that those of the case which sought to follow it were for practical purposes identical with them. ¶ At any rate, on the facts of this case, I do not think that *Green v. Palmer* (1) should be followed. I therefore conclude that the answer in this case is that for which Mr. Albery contends, and I would accordingly allow the appeal.

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SOMERVELL L.J. I agree. I cannot find any words in the Act (and, as my Lord has said, we were referred to sections to which the attention of the judge was not drawn), which would justify the exclusion from sch. XV of leases which on their true construction are perpetually renewable but where words referring to perpetual renewal, or some such phrase, are not to be found in the relevant covenant. I have nothing which I wish to add to the reasons which have been given by the Master of the Rolls. I would also like to express my agreement with his opinion that, having regard to our decision in this case, it seems to me that *Green v. Palmer* (1), as reported, cannot be regarded as of authority.

JENKINS L.J. I agree.

Appeal allowed.

Solicitors : *Evan Davies & Co. ; Neve, Beck & Co.*

(1) [1944] Ch. 328.

END OF VOL. AND OF CHANCERY SERIES FOR 1950.

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